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Tort Liability, Religious Entities, and the Decline of Constitutional Protection

SCOTT C. IDLEMAN*

The First Amendment prohibits the adjudication of legal actions that directly or derivatively require the resolution of religious questions, such as disputes over theological doctrine, scriptural interpretation, or ecclesiastical law. Among the most visible cases implicating this principle are tort suits against religious institutions and clergy, often stemming from the latter's alleged misconduct towards congregants or children. At present, the majority judicial position appears to be that most such tort actions are, in fact, barred by the First Amendment. This Article shall argue that this adjudicatory prohibition, at least in the tort context, will likely be functionally eroded if not formally eliminated in the coming decades.

Several reasons, taken together, suggest the principle's demise. Not only has tort litigation against religious entities increased in recent years, thus generating more challenges to the principle, but this increase has been accompanied by the public's growing sympathy for the victims of clergy exploitation, by a waning societal appreciation for institutional religion, and by an undervaluation of the First Amendment concerns at stake. Moreover, because such suits are generally brought in state court rather than federal court, these public attitudes may be less constrained and the judges may be less sensitive to broader constitutional limitations. Finally, even where courts are sensitive to these limitations, the constitutional framework, such as it is today, may no longer provide support for the principle of nonadjudication as applied to tort cases. In addition to the principle's unsure footing either in doctrine or in theory, as well as an apparent traditional disfavoritism towards viewing religious liberty in institutional terms, recent years have also witnessed a trend under both religion clauses towards formal neutrality and the idea that religion should generally be treated as having no independent constitutional significance.

The Article is divided into four parts. Part I will contend that the bar on certain tort actions is actually an application of a more general prohibition on the adjudication of religious questions and will examine the contours of this prohibition and its specific application in the tort context. Part II will then explore various reasons, such as those noted above, why the bar on adjudicating certain tort actions may increasingly be limited or eroded with time. Part III will examine the doctrinal means by which the principle's erosion may be effected, while Part IV will examine various factors that may forestall this erosion.

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I. THE GENERAL PROHIBITION ON ADJUDICATING RELIGIOUS QUESTIONS

A. *Its Nature and Manifestations*

If asked to envision a violation of the First Amendment religion clauses, one is likely to focus on the outward actions of the government that affect or involve religious individuals or institutions—the distribution of funds to religious schools, for example, or the criminalization of peyote use, or the restrictive zoning of church property.¹ But the religion clauses also contain a more abstract restriction on the capacity of government, and especially the judiciary, to involve itself in matters of religious truth and doctrine, potentially irrespective of the conduct at issue and the identities of the parties. Broadly conceptualized, this restriction amounts to a general prohibition on the adjudication of religious questions, not unlike the Article III prohibition on the adjudication of so-called political or nonjusticiable questions.²

1. The First Amendment religion clauses consist of the Establishment Clause, which provides that “Congress shall make no law respecting an establishment of religion,” and the Free Exercise Clause, which provides that “Congress shall make no law . . . prohibiting the free exercise [of religion] . . .” U.S. CONST. amend. I. Although some have noted that it is mistaken to view these guarantees as two separate “clauses,” see Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 478 n.8 (1991); Richard John Neuhaus, *A New Order of Religious Freedom*, 60 GEO. WASH. L. REV. 620, 627 (1992), this Article shall adopt the conventional usage, however erroneous, and treat them as such.

2. Although “the Supreme Court never has dismissed a case as nonjusticiable on the grounds that the issue was religious in nature,” Lawrence C. Marshall, Comment, *The Religion Clauses and Compelled Religious Divorces: A Study in Marital and Constitutional Separations*, 80 NW. U. L. REV. 204, 250 n.221 (1985), several other courts as well as scholars have employed the concept of nonjusticiability to characterize religious questions. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-11, at 1236 (2d ed. 1988) (describing religious questions as “non-justiciable”); Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 132 (noting that “[t]he Court has developed a religion clause analogue to the political question doctrine” that applies when the resolution of litigation “depends upon interpretation of religious doctrine” but “no such interpretation is forthcoming,” in which case “the Court generally must abstain from adjudicating the case rather than rendering the interpretation itself, because theological and ecclesiastical questions are not justiciable”); Marjorie Heins, *“Other People’s Faiths”: The Scientology Litigation and the Justiciability of Religious Fraud*, 9 HASTINGS CONST. L.Q. 153 (1981); Stephen Senn, *The Prosecution of Religious Fraud*, 17 FLA. ST. U. L. REV. 325, 337 (1990) (describing the “issue of religious verity” as “nonjusticiable”); Matthew S. Steffey, *Redefining the Modern Constraints of the Establishment Clause: Separable Principles of Equality, Subsidy, Endorsement, and Church Autonomy*, 75 MARQ. L. REV. 903, 905 (1992) (noting that “the Court has forbidden judicial resolution of questions concerning a church’s creed, governance, or discipline” and concluding that “[s]uch issues are, in effect, nonjusticiable”); Bernard Roberts, Note, *The Common Law Sovereignty of Religious Lawfinders and the Free Exercise Clause*, 101 YALE L.J. 211, 226-28 (1991) (proposing that “[p]erhaps the model of a ‘religious question doctrine,’ analogous to one version of the political question doctrine, will help to illuminate the civil courts’ habit of refraining from inquiry into matters of religious law”); *infra* note 23; cf. Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 759-62 (1992) (assessing whether

This general prohibition manifests itself in at least three lines of cases. Under the first, it has long been recognized that the government, including a court or a jury, may not inquire into the validity of a religious assertion or belief. Whether couched in terms of "truth or falsity,"³ "reasonableness,"⁴ "verity,"⁵ "correctness,"⁶ or "worthiness,"⁷ the essential idea is that the government is categorically barred from scrutinizing religious beliefs or claims with respect to some measure of objective validity.⁸ In the words of one court, "it is not for us to approve or disapprove of the church's beliefs."⁹ Under the second line of cases, the government is forbidden from undertaking the independent interpretation of religious texts or tenets, at least in a manner that will yield an authoritative declaration or determination as to their meaning.¹⁰ Accordingly, it has been stated that "[c]ourts are not arbiters of scriptural

free exercise accommodation claims can or should be conceptualized as nonjusticiable).

3. *Sherbert v. Verner*, 374 U.S. 398, 407 (1963) (reaffirming "the prohibition against judicial inquiry into the truth or falsity of religious beliefs"); *Williams v. Bright*, 658 N.Y.S.2d 910, 914 (N.Y. App. Div.) ("American courts have no business endorsing or condemning the truth or falsity of anyone's religious beliefs."), *appeal dismissed*, 686 N.E.2d 1368 (N.Y. 1997).

4. *Callahan v. Woods*, 658 F.2d 679, 685 (9th Cir. 1981) ("In applying the free exercise clause of the First Amendment, courts may not inquire into the truth, validity, or reasonableness of a claimant's religious beliefs."); *Estate of Supple v. Roman Catholic Archbishop*, 55 Cal. Rptr. 542, 545 (Cal. Ct. App. 1966) (equating challenge to "the reasonableness of [one's religious] beliefs" with a challenge to "the truth or scientific validity of such beliefs").

5. *United States v. Ballard*, 322 U.S. 78, 86 (1944) (holding that "the truth or verity" of a party's religious claims, even if disputed by another party, may not be submitted to the jury); *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985) (contrasting "sincerity," which is a permissible object of inquiry, with "verity," which is not), *aff'd*, 479 U.S. 60 (1986).

6. *Smith v. Board of Educ.*, 844 F.2d 90, 93 (2d Cir. 1988) ("Generally it is not proper for courts to evaluate the truth or correctness of an individual's sincerely held religious beliefs.").

7. *Kaplan v. Hess*, 694 F.2d 847, 851 (D.C. Cir. 1982) (citing *Ballard* and holding that "the court may not inquire into the worthiness of appellants' religious beliefs to ascertain whether they merit First Amendment protection").

8. See generally *U-John v. Composite Bible-Based Religious Body of All Protestant & Catholic Orgs. of Christendom & All Jewish Orgs. of Judaism*, 839 F. Supp. 861, 862-64 (N.D. Ga. 1993) (refusing to adjudicate suit alleging that all Christian and Jewish entities were in theological error); *TRIBE*, *supra* note 2, § 14-11, at 1231-32. In *U-John*, the plaintiff ("U-John") rather modestly claimed to be "King Priest of the Universal Sovereign, My-John," *id.* at 862, as well as "'God's only begotten son' and 'King Priest of God's Government with human subjects throughout the entire earth.'" *Id.* at 862 n.1 (quoting plaintiff's memorandum of facts).

9. *Meroni v. Holy Spirit Ass'n for Unification of World Christianity*, 506 N.Y.S.2d 174, 176 (N.Y. App. Div. 1986).

10. See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981) ("[T]o inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith . . . would tend inevitably to entangle the State with religion in a manner forbidden by our cases."); *Callahan v. Woods*, 658 F.2d 679, 686 (9th Cir. 1981) (noting that courts must abstain "from evaluating the merits of a scriptural interpretation"); *Havurah v.*

interpretation,"¹¹ and that "[i]t is not the province of government officials or courts to determine religious orthodoxy."¹² Third and lastly, under what is sometimes called the ecclesiastical abstention doctrine,¹³ the government may not inquire into or review the internal decisionmaking or governance of religious entities, especially those of a hierarchical nature.¹⁴ In its formal rendition, "[t]he rule of judicial

Zoning Bd. of Appeals, 418 A.2d 82, 87 (Conn. 1979) ("What are the particular tenets of a recognized religious group is not a matter for secular decision."); *Baumgartner v. First Church of Christ*, 490 N.E.2d 1319, 1324, 1325 (Ill. Ct. App. 1986) (holding that a claim which "would require the court to extensively investigate and evaluate religious tenets and doctrines" is "not a justiciable controversy" insofar as "the first amendment precludes such an intrusive inquiry by the civil courts into religious matters"); *Glass v. First United Pentacostal Church of DeRidder*, 676 So. 2d 724, 731 (La. Ct. App. 1996) ("[I]t is without question that the Court may not undertake to interpret the scriptures referenced within the article in question concerning church discipline."); *Hester v. Barnett*, 723 S.W.2d 544, 559 (Mo. Ct. App. 1987) ("The free exercise clause forbids a court from any evaluation of the 'correctness' of the content of religious sermons as expressions of belief or religious practice.").

11. *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981). For a critical assessment of this principle as invoked in *Thomas*, see Samuel J. Levine, *Rethinking the Supreme Court's Hands-Off Approach to Questions of Religious Practice and Belief*, 25 FORDHAM URB. L.J. 85, 92-101 (1997).

12. *Teterud v. Burns*, 522 F.2d 357, 360 (8th Cir. 1975); see also *Daniel v. Waters*, 515 F.2d 485, 491 (6th Cir. 1975) (invalidating under the Establishment Clause a Tennessee statutory provision allowing the omission from public school textbooks of "occult or satanical beliefs of human origin" because "[i]t would be utterly impossible for the Tennessee Textbook Commission to determine which religious theories were 'occult' or 'satanical' without seeking to resolve the theological arguments which have embroiled and frustrated theologians through the ages"); *Saunders-El v. Tsoulos*, 1 F. Supp. 2d 845, 848 (N.D. Ill. 1998) (noting "the undesirability of judges donning religious robes over judicial ones" and that "courts are not equipped to resolve intra-faith differences among followers of a particular creed in relation to the Religion Clauses").

13. See, e.g., *Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 819 F.2d 875, 878 & n.1 (9th Cir. 1987); *Dobrota v. Free Serbian Orthodox Church*, 952 P.2d 1190, 1194 (Ariz. Ct. App. 1998); *Barnes v. Outlaw*, 937 P.2d 323, 326 (Ariz. Ct. App. 1996), *vacated in part on other grounds*, 964 P.2d 484 (Ariz. 1998); *O'Connor v. Diocese of Honolulu*, 885 P.2d 361, 364 (Haw. 1994); *Korean Presbyterian Church of Seattle Normalization Comm. v. Lee*, 880 P.2d 565, 566 (Wash. Ct. App. 1994). For a critical overview of the doctrine, see Paul J. Morken, *Church Discipline and Civil Tort Claims: Should Ecclesiastical Tribunals Be Immune?*, 28 IDAHO L. REV. 93, 97-120 (1991-92).

14. See, e.g., *Jones v. Wolf*, 443 U.S. 595, 602 (1979).

[T]he First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice. As a corollary to this commandment, the Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization.

Id. (citations omitted); see also *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976).

[W]here resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest

deference is that civil courts are to do no more than determine the highest ecclesiastical tribunal with jurisdiction over the dispute, ascertain the decision of the tribunal, and defer to its resolution of the dispute."¹⁵

Most courts agree that each manifestation, and thus the general prohibition itself, is ultimately rooted in the First Amendment. They disagree, however, on the appropriate clause.¹⁶ Some ground the doctrines in the Free Exercise Clause or, more

ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them.

Id.; see also *Drevlow v. Lutheran Church, Mo. Synod*, 991 F.2d 468, 471 (8th Cir. 1993) ("The Constitution forbids secular courts from deciding whether religious doctrine or ecclesiastical law supports a particular decision made by church authorities."); *Smith v. O'Connell*, 986 F. Supp. 73, 76 (D.R.I. 1997) ("It is well established that the First Amendment prohibits secular courts from intervening in the internal affairs of hierarchical churches by deciding what, essentially, are religious matters."); *Maxwell v. Brougher*, 222 P.2d 910, 911 (Cal. Ct. App. 1950).

Where the subject matter of a dispute is purely ecclesiastical in its character, a matter which concerns church discipline or the conformity of its members to the standard of morals required of them, the decision of the church tribunal will not be interfered with by the secular courts either by reviewing their acts or by directing them to proceed in a certain manner or, in fact, to proceed at all.

Id.; see also *Tran v. Fiorenza*, 934 S.W.2d 740, 743 (Tex. App. 1996).

The civil courts will . . . not intrude into the church's governance of "religious" or "ecclesiastical" matters, such as theological controversy, church discipline, ecclesiastical government, or the conformity of members to standards of morality. Furthermore, "courts will not attempt to right wrongs related to the hiring, firing, discipline or administration of clergy."

Id. (quoting *Higgins v. Maher*, 258 Cal. Rptr. 757, 757-58 (Cal. Ct. App. 1989)). See generally *Ira Mark Ellman, Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CAL. L. REV. 1378 (1981); *Douglas Laycock, Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1394-97 (1981); *Levine, supra* note 11, at 88-92; *Louis J. Sirico, Jr., Church Property Disputes: Churches as Secular and Alien Institutions*, 55 FORDHAM L. REV. 335 (1986); *Steffey, supra* note 2, at 949-53.

15. *Carl H. Esbeck, A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 NOTRE DAME L. REV. 581, 601 n.75 (1995); see also *Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar*, 179 F.3d 1244, 1248 (9th Cir. 1999).

Under [the deference] approach [of *Watson v. Jones*], the court avoids entanglement in religious issues by accepting the decision of the established decision-making body of the religious organization. . . . When the nature of the religious organization or the identity of its decision-making body is disputed on the basis of religious doctrine . . . the resolution of these threshold questions may require a court to intrude impermissibly into religious doctrinal issues.

Id. (citations omitted); see, e.g., *Decker ex rel. Decker v. Tschetter Hutterian Brethren, Inc.*, 594 N.W.2d 357, 362-65 (S.D. 1999) (refusing to adjudicate various property, contract, and tort issues related to schism and alleged wrongful excommunicative expulsion, instead deferring to apparent church authority).

16. See *Smith v. O'Connell*, 986 F. Supp. 73, 80 (D.R.I. 1997) (noting that courts have

generally, the concept of religious freedom;¹⁷ others opt for the Establishment Clause;¹⁸ still others look expressly to both clauses,¹⁹ while a few courts refer the

grounded the doctrine in different aspects of the First Amendment, some using the Establishment Clause while others using a principle of religious autonomy). This Article, being largely descriptive and predictive, does not explicitly or systematically argue in favor of a particular constitutional basis or mode of operation of the general prohibition (although the concept of nonjusticiability under the Establishment Clause strikes this author as the most appropriate). Nor does this Article delineate a normative constitutional analysis for determining the adjudicability of tort claims against religious entities, however necessary or helpful such an analysis may be. The focus, rather, is simply on the likely dimensions and disposition of the analyses actually employed by courts, taking into account various cultural, institutional, and doctrinal considerations.

17. See, e.g., *Amato v. Greenquist*, 679 N.E.2d 446, 450 (Ill. App. Ct. 1997).

Our courts have refused to entertain such claims because the first amendment's free exercise clause prohibits courts from considering claims requiring the interpretation of religious doctrine. To permit claims for clergy malpractice would require courts to establish a standard of reasonable care for religious practitioners practicing their respective faiths, which necessarily involves the interpretation of doctrine.

Id.; see also *Belin v. West*, 864 S.W.2d 838, 841 (Ark. 1993).

[R]eligious freedom includes the power of religious bodies to determine for themselves, free from state interference, matters of church government as well as those of faith and doctrine. In short, it is impermissible for the civil courts to substitute their own interpretation of the doctrine of a religious organization for the interpretation of the religious organization.

Id.; see also *Tran*, 934 S.W.2d at 743 (noting that, in regard to various claims of tortious or similar conduct, "[a]lthough such wrongs may exist and be severe, and although the administration of the church may be inadequate to provide a remedy, the preservation of the free exercise of religion is deemed so important a principle it overshadows the inequities which may result from its liberal application").

18. See, e.g., *United Christian Scientists v. Christian Science Bd. of Dirs.*, 829 F.2d 1152, 1167 (D.C. Cir. 1987) ("The Establishment Clause prohibits any and all official judgments concerning the rectitude of religious belief."); *Klagsbrun v. Va'ad Harabonim of Greater Monsey*, 53 F. Supp. 2d 732 (D.N.J. 1999) (holding that the Establishment Clause bars various defamation claims); *Doe v. Evans*, 718 So. 2d 286, 288-93 (Fla. Dist. Ct. App. 1998) (applying Establishment Clause entanglement analysis to various tort claims), *review granted*, 735 So. 2d 1284 (Fla. 1999).

19. See, e.g., *Ayon v. Gourley*, 47 F. Supp. 2d 1246, 1249 (D. Colo. 1998) (holding that adjudicating various tort claims "would violate both the Free Exercise and Establishment Clauses"), *aff'd*, 185 F.3d 873 (10th Cir. 1999); *Konkle v. Henson*, 672 N.E.2d 450, 454 (Ind. Ct. App. 1996) (citing principles and doctrines from both clauses, though primarily proceeding under the Establishment Clause); *Downs v. Roman Catholic Archbishop*, 683 A.2d 808, 811 (Md. Ct. Spec. App. 1996) (interpreting the U.S. Supreme Court's cases and holding that "under the First Amendment Establishment and Free Exercise clauses, civil courts have no authority to second-guess ecclesiastical decisions made by hierarchical church bodies"); *Black v. Snyder*, 471 N.W.2d 715, 718-21 (Minn. Ct. App. 1991) (analyzing contract, civil rights, and defamation claims separately under each clause); *Gibson v. Brewer*, 952 S.W.2d 239, 246-47 (Mo. 1997) (en banc) (discussing both "entanglement between church and state" and free exercise); *F.G. v. MacDonell*, 696 A.2d 697, 702-03 (N.J. 1997) (looking primarily to the Free Exercise Clause but mixing in elements from Establishment Clause doctrine, e.g.,

reader to the First Amendment as a whole.²⁰ Most courts also agree that the general prohibition, once triggered, normally precludes further adjudication of the issue in question.²¹ They part ways, however, regarding the prohibition's precise legal operation. The majority of courts broadly conceptualize it as a bar on jurisdiction;²²

that civil court "entanglement could restrain the free exercise of religion"); *Church of Scientology v. Siegelman*, 475 F. Supp. 950, 952-53 (S.D.N.Y. 1979) (combining various principles of each clause).

20. See, e.g., *Jones v. Wolf*, 443 U.S. 595, 602 (1979).

[T]he First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice. As a corollary to this commandment, the Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization.

Id. (citations omitted); see also *Doe v. Hartz*, 970 F. Supp. 1375, 1429 n.42 (N.D. Iowa 1997) (noting that the Eighth Circuit's cases refer to both clauses and that "[t]here appears to be some uncertainty or a split in authority in other jurisdictions as to which clause of the First Amendment is implicated by a claim against religious institutions or members of the clergy"), *rev'd in part and vacated in part on other grounds*, 134 F.3d 1339 (8th Cir. 1998); *Green v. United Pentacostal Church Int'l*, 899 S.W.2d 28, 29 (Tex. App. 1995) (similar), *cert. denied*, 517 U.S. 1134 (1996); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 50 (1998) ("When abstaining from intrachurch dispute cases, the Supreme Court references the First Amendment generally, not expressly singling out either the Establishment Clause or Free Exercise Clause.").

21. In addition to adjudication, the prohibition may also circumscribe or preclude other aspects of litigation. It may, for example, limit discovery. See, e.g., *In re Pleasant Glade Assembly of God*, 991 S.W.2d 85, 90 (Tex. App. 1998) (holding that because "the complained-of conduct is inexorably intertwined with [the defendant's] religious beliefs," and would therefore "violate[] the First Amendment, . . . any discovery relating to these matters would likewise be barred as irrelevant"), *order stayed on other grounds*, No. 2-98-222-CV, 1999 WL 13249 (Tex. Ct. App. Jan. 13, 1999). See generally Jeffrey Hunter Moon, *Protection Against the Discovery or Disclosure of Church Documents and Records*, 39 CATH. LAW. 27, 34-44 (1999). Likewise, it may affect the admissibility of evidence. See, e.g., *Davis v. Church of Jesus Christ of Latter Day Saints*, 852 P.2d 640, 646-49 (Mont. 1993) (affirming rulings on motions in limine restricting the admission of evidence relating to certain Church practices and doctrines). And, where adjudication does occur, it may limit remedies. See *Bollard v. California Province of Soc'y of Jesus*, No. C 97-3006 SI, 1998 WL 273011, at *3 (N.D. Cal. May 15, 1998) (noting in a Title VII case, alleging wrongful constructive termination of candidacy for priesthood, that the court "would certainly become entangled in the religious realm if it were to address the extent to which plaintiff could be 'made whole' from loss of a life of spiritual service or the proper compensation for the 'emotional pain' one suffers from this deprivation" and that "[t]he prospect of punitive damages, designed to change defendants' conduct of Formation [of priests], would also involve the Court in an unconstitutional intrusion into the relationship between the Society of Jesus and its clergy"); cf. *Tilton v. Marshall*, 925 S.W.2d 672, 680 (Tex. 1996) (disallowing compensation for the plaintiffs' "allegedly unanswered prayers").

22. See, e.g., *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328, 330-33 (4th Cir. 1997) (affirming dismissal for lack of subject matter jurisdiction under the First Amendment); *Klagsbrun*, 53 F. Supp. 2d at 732 (dismissing for lack of subject matter jurisdiction under the Establishment Clause); *Belin*, 864 S.W.2d at 841-42; *The Bible Way Church of Our Lord Jesus Christ of the Apostolic Faith v. Beards*, 680 A.2d 419, 427 (D.C. 1996) (addressing it

others employ the more specialized concept of nonjusticiability.²³ Still others describe their task in terms of abstention²⁴ or in terms of applying an evidentiary rule.²⁵ Periodically, a court will even analyze the matter directly under the balancing

as "a potential First Amendment bar to the trial court's subject matter jurisdiction"), *cert. denied*, 520 U.S. 1155 (1997); *Brazauskas v. Fort Wayne-S. Bend Diocese, Inc.*, 714 N.E.2d 253, 262 (Ind. Ct. App. 1999) (holding that the trial court lacked subject matter jurisdiction over a defamation claim against religious defendants because its adjudication would have entailed "an impermissible scrutiny of religious doctrine"); *Downs*, 683 A.2d at 811-13; *Buchanan v. Second Tabernacle Missionary Baptist Church*, No. 70063, 1996 WL 417135, at *1 (Ohio Ct. App. July 25, 1996); *Green*, 899 S.W.2d at 29-31; *see also* *Young v. Northern Ill. Conf. of United Methodist Church*, 21 F.3d 184, 185-88 (7th Cir.) (holding that the First Amendment precluded subject matter jurisdiction over a Title VII suit challenging church hiring procedures), *cert. denied*, 513 U.S. 929 (1994).

23. *See, e.g.*, *Najafi v. INS*, 104 F.3d 943, 949 (7th Cir. 1997) ("Determination of a religious faith by a tribunal is fraught with complexity as true belief is not readily justiciable."); *Nayak v. MCA, Inc.*, 911 F.2d 1082, 1083 (5th Cir. 1990) ("The plaintiff asked the court to decide the 'correct' interpretation of the life of Christ. This is not a justiciable question before a federal court."), *cert. denied*, 498 U.S. 1087 (1991); *Stansfield v. Starkey*, 269 Cal. Rptr. 337, 345 (Cal. Ct. App. 1990) ("[T]he threat that if one left the church one's relatives 'would be damned in Hell forever' implicates religious beliefs and is not justiciable." (citation omitted) (quoting *Molko v. Holy Spirit Ass'n*, 762 P.2d 46, 64 (Cal. 1988), *cert. denied*, 490 U.S. 1084 (1989)); *Baumgartner v. First Church of Christ, Scientist*, 490 N.E.2d 1319, 1326 (Ill. Ct. App.) ("Whether or not defendants negligently or intentionally applied church doctrine is not a justiciable controversy."), *cert. denied*, 479 U.S. 915 (1986).

24. This is certainly the case where a court claims that it is invoking the "Ecclesiastical Abstention Doctrine." *See supra* note 13. Even outside that specific context, one can find references to the concept of abstention. *See, e.g.*, *Callahan v. Woods*, 658 F.2d 679, 686 (9th Cir. 1981) (describing *Thomas v. Review Bd.*, 450 U.S. 707 (1981), as an "abstention from evaluating the merits of a scriptural interpretation"). In some instances, of course, abstention may simply be another means of indicating a lack of jurisdiction. *See Esbeck, supra* note 20, at 42-43.

25. The most common use of an evidentiary approach occurs in the judicial handling of intrachurch disputes. For example, in *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), the Court held that "the decisions of the proper church tribunals on matters purely ecclesiastical . . . are accepted . . . before the secular courts as conclusive," *id.* at 116 n.23 (quoting *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16-17 (1929)); *see also* *Jones v. Wolf*, 443 U.S. 595, 611-20 (1979) (Powell, J., dissenting) (characterizing the operation of the neutral principles approach in evidentiary terms, indeed calling it an "evidentiary rule"). Several state courts have followed suit. *See, e.g.*, *Sinai Memorial Chapel v. Dudler*, 282 Cal. Rptr. 263, 268 (Cal. Ct. App. 1991) ("[I]n the absence of fraud or collusion, the interpretation of Jewish law by an accredited body . . . is accepted in litigation before the secular courts as conclusive, even if the decision affects the civil rights of appellant and even if the decision is 'arbitrary.'"); *Fire Baptized Holiness Church v. Greater Fuller Tabernacle Fire Baptized Holiness Church*, 475 S.E.2d 767, 771 (S.C. Ct. App. 1996) (*per curiam*) ("This court must accept the National Church's interpretation of the requirements of its Discipline as conclusive."). This third doctrine is particularly evidentiary-like insofar as the Supreme Court and several lower courts recognize exceptions, such as fraud or collusion, that can rebut the presumption of conclusiveness. *See infra* text accompanying note 138.

scheme of the Free Exercise Clause,²⁶ although the propriety of this method is uncertain in the wake of *Employment Division v. Smith*.²⁷

B. Its Application to Tort Cases

In theory, the general prohibition can be triggered by virtually any controversy in which a religious question happens to be implicated.²⁸ For a variety of reasons,

26. See, e.g., *Snyder v. Evangelical Orthodox Church*, 264 Cal. Rptr. 640, 645 (Cal. Ct. App. 1989) (analyzing adjudicability of various tort claims under a free exercise compelling interest analysis). "[I]f government action—here, in the form of tort liability—burdens religious conduct, the importance of the state's interest must be weighed against the severity of the concomitant burden on religion." *Id.*; see also, e.g., *Davis*, 852 P.2d at 649 (holding, as part of a strict scrutiny analysis, that the plaintiff's "tort claim is not a right of the highest order not otherwise served so as to overbalance the Church's claim to the free exercise of religion").

27. 494 U.S. 872 (1990) (limiting significantly the applicability of heightened scrutiny in free exercise cases). Compare *Smith v. O'Connell*, 986 F. Supp. 73, 77-80 (D.R.I. 1997) (applying free exercise analysis to tort suit against religious entity, equating the "neutral principles of law" approach with "neutral laws of general application" addressed in *Smith*), and *Ayon v. Gourley*, 47 F. Supp. 2d 1246, 1248-49 (D. Colo. 1998) (similarly conflating these categories and specifically discussing "*Smith*'s neutral principles exception," although concluding that "general tort liability theories . . . do not fit the description of 'valid and neutral law[s] of general applicability'" in *Smith* because while "[t]he law at issue in *Smith* was a straightforward prohibition on the possession of certain specified controlled substances," claims of "outrageous conduct and negligent hiring and/or supervision . . . , by definition, require much more subjective judgment on the appropriateness of the conduct than the across-the-board prohibition in *Smith*"), *aff'd*, 185 F.3d 873 (10th Cir. 1999), with *Combs v. Central Tex. Annual Conf. of the United Methodist Church*, 173 F.3d 343, 349 (5th Cir. 1999) (recognizing a "distinction between the two strands of free exercise cases—restrictions on an individual's actions that are based on religious beliefs and encroachments on the ability of a church to manage its internal affairs"—and holding, with regard to the judicially crafted ministerial exception under Title VII, that the "fundamental right of churches to be free from government interference in their internal management and administration has not been affected by the Supreme Court's decision in *Smith* and the demise of *Sherbert*"), *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 461-63 (D.C. Cir. 1996) (holding that the ministerial exception under Title VII survived the diminishment of free exercise protection effected by *Smith*), *EEOC v. Roman Catholic Diocese*, 48 F. Supp. 2d 505, 511-13 (E.D.N.C. 1999) (holding that "*Smith* did not overrule the ministerial exception"), and *Lee Boothby, Religious Freedom in the United States Following City of Boerne v. Flores*, 2 NEXUS 111, 117-18 (Fall 1997) (arguing that "*Smith* in no way encroaches upon the long line of church autonomy cases").

28. See *TRIBE*, *supra* note 2, § 14-11, at 1236 (noting that "the [F]irst [A]mendment has been construed to mean that religious questions remain non-justiciable even when they do not reach civil courts independently but instead form preliminary or ancillary issues in an otherwise justiciable dispute"); *Steffey*, *supra* note 2, at 947 (observing that "the application of any legal standard—including constitutional standards—can turn on a religious question"). By the same token, the mere fact that a dispute involves a religious entity, its representatives, or its property does not render the dispute nonjusticiable. "While the First Amendment prohibits excessive entanglement with religion, it by no means prohibits courts from any

however, it regularly arises in tort actions against religious entities, typically as one of many First Amendment concerns. In such cases, in fact, the most apparent constitutional concern is often not one of the general prohibition *per se* but rather of the potential abridgement of church autonomy (although the third component of the general prohibition, the so-called ecclesiastical abstention doctrine, arguably reflects both the principle of church autonomy and the principle of not adjudicating religious questions). The concern, in particular, is that judicial assessment and regulation of church or clergy decisionmaking could constitute undue interference with the internal governance of religious institutions, either because they themselves possess free exercise rights or because their members, by voluntary association, possess such rights collectively. To determine, for example, that a church negligently installed or transferred a particular pastor is effectively to override the church's prior decision in this regard and to dictate the church's or its congregation's decisionmaking in the future. Yet, as many courts have recognized, decisions relating to clergy hiring or transfer may amount to important and often irreducibly religious practices or expressions of faith and doctrine.²⁹ Thus, even apart from the issue of religious

involvement in religious disputes. The Establishment Clause merely prohibits courts from determining underlying questions of religious doctrine and practice." *Klagsbrun v. Va'ad Harabonim of Greater Monsey*, 53 F. Supp. 2d 732, 737 (D.N.J. 1999).

29. *See, e.g., Kaufmann v. Sheehan*, 707 F.2d 355, 358-59 (8th Cir. 1983).

While there may be some secular aspects to employment and conceivably even to the priesthood or clergy, it is apparent that the priest or other member of the clergy occupies a particularly sensitive role in any church organization. Significant responsibility in matters of the faith and direct contact with members of the church body with respect to matters of the faith and exercise of religion characterize such positions.

Id.; *see also McClure v. Salvation Army*, 460 F.2d 553, 558-59 (5th Cir.) ("The relationship between an organized church and its ministers is its lifeblood . . . Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection."), *cert. denied*, 409 U.S. 896 (1972); *Roman Catholic Diocese*, 48 F. Supp. 2d at 515 (applying *McClure* and *Rayburn v. General Conf. of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986), to a case of alleged discriminatory and retaliatory reassignments of a lay music minister and concluding that "[t]he government's intrusion into a church's employment decision regarding the individual who is to be a minister by 'shar[ing her] faith, serv[ing] the community, and express[ing] the love of God and neighbor through music,' is no doubt an excessive entanglement when the government advocates instituting policies, practices and procedures for an ecclesiastical body") (alteration in original); *Dean v. Alford*, 994 S.W.2d 392, 395 (Tex. App. 1999).

[T]he issue of a pastor's ouster is ecclesiastical in nature. Courts may not attempt to right wrongs related to the hiring, firing, discipline, or administration of clergy. While such wrongs may exist and be severe, and although the administration of the church may be inadequate to provide a remedy, the preservation of the free exercise of religion is deemed so important a principle it overshadows the inequities which may result from its liberal application.

Id. (citation omitted); *see also Howard v. Covenant Apostolic Church, Inc.*, 705 N.E.2d 385, 388 (Ohio Ct. App. 1997) (noting that "matters regarding 'who should preach from the pulpit' are fundamentally and unquestionably beyond the jurisdiction of secular courts"), *appeal not*

questions, the decisionmaking of religious entities may be immunized from certain tort actions simply as a matter of church autonomy, although the additional presence of religious questions could, of course, dramatically strengthen the case against adjudication.³⁰

A second concern, and one more likely to implicate the general prohibition, is that such a determination might further require the court to scrutinize the reasoning or doctrine underlying the church's conduct. Where that reasoning or doctrine is religious in nature, however, doing so may create excessive entanglement of government and religion.³¹ The danger, specifically, is that of doctrinal entanglement, which is one of several types of entanglement restricted by the Establishment Clause.³² So, for example, if the issue of clergy placement implicates

allowed, 688 N.E.2d 1043 (Ohio 1998); *Gibson v. Brewer*, 952 S.W.2d 239, 247 (Mo. 1997).

[J]udicial inquiry into hiring, ordaining, and retaining clergy would result in an endorsement of religion, by approving one model for church hiring, ordination, and retention of clergy. A church's freedom to select clergy is protected "as a part of the free exercise of religion against state interference." Ordination of a priest is a "quintessentially religious" matter, "whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals of this hierarchical church."

Id. (citations omitted) (quoting *Kedroff*, 344 U.S. at 116, and *Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696, 719 (1976), respectively).

30. *See, e.g.*, *Drevlow v. Lutheran Church, Mo. Synod*, 991 F.2d 468, 471 (8th Cir. 1993) ("The First Amendment proscribes intervention by secular courts into many employment decisions made by religious organizations based on religious doctrine or beliefs. Personnel decisions are protected from civil court interference where review by civil courts would require the courts to interpret and apply religious doctrine or ecclesiastical law."). Although infringement of church autonomy has been expressed here as a potential Establishment Clause problem, especially in terms of entanglement, such infringement can also be analyzed, and perhaps more easily so, under the Free Exercise Clause. *See generally* Laycock, *supra* note 14, at 1388-98. This is especially true where the entanglement is less doctrinal and more administrative or regulatory. *But cf.* James D. Gordon III & W. Cole Durham, Jr., *Toward Diverse Diversity: The Legal Legitimacy of Ex Corde Ecclesiae*, 25 J.C. & U.L. 697, 703-04 (1999) (noting that Laycock's "analysis was developed . . . in a pre-Smith world, when the Free Exercise Clause was understood to have some bite against neutral regulatory burdens imposed on religious institutions" and that, today, grounding the autonomy doctrine in the Establishment Clause may prove more advantageous) (footnote omitted).

31. *See, e.g.*, *Gibson*, 952 S.W.2d at 246-47 ("Questions of hiring, ordaining, and retaining clergy . . . necessarily involve interpretation of religious doctrine, policy, and administration. Such excessive entanglement between church and state has the effect of inhibiting religion, in violation of the First Amendment."); *see also Drevlow*, 991 F.2d at 471 ("The Constitution forbids secular courts from deciding whether religious doctrine or ecclesiastical law supports a particular decision made by church authorities."); *Klagsbrun*, 53 F. Supp. 2d at 742 ("[I]nquiry into the methodology of how religious organizations arrive at their conclusions concerning questions of religious doctrine are, like the conclusions themselves, beyond the ken of civil courts.").

32. *See* TRIBE, *supra* note 2, § 14-11, at 1226-32 (presenting a typology of administrative, vesting, political, regulatory, and doctrinal entanglement); Robert A. Destro, *Developments in Liability Theories and Defenses*, 37 CATH. LAW. 83, 96-97 (1997) ("There are three basic types of entanglement . . . 1) administrative entanglement, such as oversight of church or

not only the church's decisions but also the canon law underlying those decisions, then the issue cannot be fully addressed by a court—or any arm of civil government—insofar as its resolution would essentially require the court itself to expound and apply the canon law.³³ So likewise would the restriction apply to matters involving Jewish law where the government is asked to make determinations or resolve disputes necessitating its interpretation.³⁴ Such matters, turning as they do on

church-school use of state moneys, . . . 2) doctrinal entanglement, such as utilizing courts to decide matters of doctrine, . . . and 3) political entanglement, such as excessive church involvement in political affairs.”); Note, *Government Noninvolvement with Religious Institutions*, 59 TEX. L. REV. 921, 935-39 (1981) (explaining the distinction between doctrinal and administrative entanglement, and elaborating on the former).

33. See, e.g., *Isely v. Capuchin Province*, 880 F. Supp. 1138, 1150 (E.D. Mich. 1995) (“It is well-settled that when a court is required to interpret Canon Law or internal church policies and practices, the First Amendment is violated because such judicial inquiry would constitute excessive government entanglement with religion.”); *Barnes v. Outlaw*, 937 P.2d 323, 326 (Ariz. Ct. App. 1996) (“The doctrine of ecclesiastical abstention prohibits courts from determining issues of canon law.”), *vacated in part on other grounds*, 964 P.2d 484 (Ariz. 1998); *Ross v. Ross*, No. FA 970162587S, 1998 WL 516159, at *11 (Conn. Super. Ct. Aug. 10, 1998) (“The court finds that if the parties’ claims are held valid, in such future cases a Superior Court must apply and interpret religious laws and rules. . . . This case is a request to examine the internal workings of Episcopal Church canon law. This court will not apply canon law.”); *McEnroy v. St. Meinrad Sch. of Theology*, 713 N.E.2d 334 (Ind. Ct. App. 1999) (affirming dismissal for lack of subject matter jurisdiction over Catholic theology professor’s contract and tort claims because “resolution of [her] claims would require the trial court to interpret and apply religious doctrine and ecclesiastical law” including issues of ecclesiastical jurisdiction and authority under canon law); *Parent v. Roman Catholic Bishop*, 436 A.2d 888, 890 (Me. 1981) (remarking that “the courts of this State have no jurisdiction” to assess “the scope of the bishop’s authority under canon law and the propriety of his exercise of that authority in this case”); *Zimmer v. Naumann*, No. C2-96-1066, 1997 WL 10520, at *2 (Minn. Ct. App. June 16, 1997) (“We believe that the admission of canon law evidence would compel the district court to construe and apply unfamiliar canons that are inherently doctrinal and ecclesiastical in nature; such evidence could lead to excessive entanglement that is prohibited under the Establishment Clause.”), *cert. denied*, 118 U.S. 74 (1997); *State v. Burckhard*, 592 N.W.2d 523, 526 (N.D. 1999) (stating that after determining in a criminal theft prosecution, under the Catholic Church’s Code of Canon Law, the defendant priest’s authority to expend church funds was ultimately subject to the authority of his bishop, holding that any attempt “to question [the bishop’s] motives and have a jury make factual determinations about the correctness of his administrative decisions . . . would be in direct contravention of the Establishment Clause” and that “[p]arishioners unhappy with their parish priest have recourse through internal church procedures”). See generally Marianne Perciaccante, Note, *The Courts and Canon Law*, 6 CORNELL J.L. & PUB. POL’Y 171 (1996).

34. See, e.g., *Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337, 1349-50 (4th Cir. 1995) (Wilkins, J., concurring) (concluding that an anti-fraud ordinance regulating the use of kosher designations was invalid under the Establishment Clause insofar as it “creates an excessive entanglement because it requires an interpretation and determination of religious law (i.e., whether the food represented to be kosher was, in fact, kosher) in deciding whether there has been a violation”); *Klagsbrun*, 53 F. Supp. 2d at 741 (refusing, under the Establishment Clause, to adjudicate a defamation claim that effectively necessitated judicial inquiry “into the nature of a get [a religious divorce under Jewish law], how and

points of religious doctrine, must essentially be deemed nonjusticiable.

Yet another concern, one very much at the heart of the general prohibition, arises where a court attempts to subject a church's or cleric's conduct to an "objective" standard of care, such as reasonableness or reasonable prudence, as would be customary under the law of negligence. In these cases, the court's ultimate determination may be tantamount to a state imprimatur—an official pronouncement on what is, and what is not, a reasonable interpretation and expression of the religious tradition in question. Such determinations run a particular risk of transgressing both the first and the second manifestations of the general prohibition. For instance, a determination that church or clergy conduct is reasonable or unreasonable for tort purposes may appear to be, and indeed will function like, a determination that a religious practice or an underlying religious tenet is itself reasonable or unreasonable, especially if the court expresses its determination in general terms.³⁵ Correspondingly, if the court expresses its determination in a more

under what circumstances it may or may not be given, and who has the authority to grant a get" and "into the nature and propriety of any special dispensation concerning a person's right to remarry without first giving a get to his wife"); *Ran-Dav's County Kosher, Inc. v. State*, 608 A.2d 1353 (N.J. 1992) (holding similar to *Klagsbrun*), *cert. denied*, 507 U.S. 592 (1993); *United Kosher Butchers Ass'n v. Associated Synagogues*, 211 N.E.2d 332, 334-35 (Mass. 1965) (affirming demurrer to suit necessitating examination of what does and does not qualify as kosher). *But see* *Sossin Sys., Inc. v. City of Miami Beach*, 262 So. 2d 28, 29-30 (Fla. Dist. Ct. App. 1972) (holding that an ordinance prohibiting the sale of non-kosher food labeled as kosher does not violate the Establishment Clause). For a larger perspective on the propriety of judicial analysis in matters both of Jewish dietary law and of Jewish marriage law, see Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law To Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781 (1998).

35. *See, e.g., In re Pleasant Glade Assembly of God*, 991 S.W.2d 85, 90 (Tex. App. 1998) (rejecting a variety of tort claims because "any inquiry into the appropriateness of the conduct would necessarily involve an inquiry into the legitimacy of the underlying religious beliefs"), *order stayed on other grounds*, No. 2-98-222-CV, 1999 WL 13249 (Tex. Ct. App. Jan. 13, 1999); *Murphy v. I.S.K. Con. of New Eng., Inc.*, 571 N.E.2d 340, 348 (Mass.), *cert. denied*, 502 U.S. 865 (1991).

Inherent in the claim that exposure to [the defendant institution's] religious beliefs causes tortious emotional damage is the notion that the disputed beliefs are fundamentally flawed and inconsistent with a proper notion of human development. . . . In a similar manner, the issue whether the Krishna Consciousness religion adheres to an appropriate vision of the family is not for the courts to decide. The defendant cannot be forced to choose between censoring its religious scriptures to remove material which may be offensive to contemporary society and paying tort damages for the privilege of maintaining unpopular religious beliefs.

Id.; *see also* *Ayon v. Gourley*, 47 F. Supp. 2d 1246, 1250 (D. Colo. 1998) (holding that adjudication of a negligent supervision claim would "cause excessive entanglement in church operations by fostering inappropriate government involvement" because "[t]he application of even general tort law principles to church procedures on the choice of priests would require an inquiry into present practices with an intent to pass on their reasonableness"), *aff'd*, 185 F.3d 873 (10th Cir. 1999).

particular way—say, relative to the religion's underlying corpus of beliefs and practices—then the determination may amount to an exposition on the correct or proper interpretation of the specific tenet or practice in question.³⁶

Paradigmatic in this regard is the so-called tort of clergy malpractice. To date, in fact, every jurisdiction presented with the opportunity has refused to recognize such a cause of action,³⁷ often because the issue of reasonableness—manifest as a “reasonably prudent clergy” standard—so starkly and unavoidably reeks of unconstitutional entanglement. Not only would such a standard be a *prima facie* element of the tort, it would presumably require particularization—for example, the reasonable Orthodox rabbi, the reasonable Roman Catholic priest, or the reasonable Presbyterian Church (U.S.A.) minister—which would only further necessitate government assessment of the religious doctrine.³⁸ This is especially problematic

36. See, e.g., *Doe v. Evans*, 718 So. 2d 286, 291 (Fla. Dist. Ct. App. 1998), *review granted*, 735 So. 2d 1284 (Fla. 1999).

In a church defendant's determination to hire or retain a minister, or in its capacity as supervisor of that minister, a church defendant's conduct is guided by religious doctrine and/or practice. Thus, a court's determination regarding whether the church defendant's conduct was “reasonable” would necessarily entangle the court in issues of the church's religious law, practices, and policies. *Id.*; see also *Williams v. Bright*, 658 N.Y.S.2d 910, 914 (N.Y. App. Div.) (refusing to adopt a subjectivized reasonableness standard to assess the plaintiff's alleged religiously-based failure to mitigate damages, stating that “[n]o secular court can decide—or, for that matter, lead a jury to decide—what is the reasonable practice of a particular religion without setting itself up as an ecclesiastical authority, and thus entangling it excessively in religious matters, in clear violation of the First Amendment”), *appeal dismissed*, 686 N.E.2d 1368 (N.Y. 1997).

37. See, e.g., *Amato v. Greenquist*, 679 N.E.2d 446, 450 (Ill. App. Ct. 1997).

Our courts have refused to entertain such claims because the first amendment's free exercise clause prohibits courts from considering claims requiring the interpretation of religious doctrine. To permit claims for clergy malpractice would require courts to establish a standard of reasonable care for religious practitioners practicing their respective faiths, which necessarily involves the interpretation of doctrine.

Id. (citations omitted); see also *H.R.B. v. J.L.G.*, 913 S.W.2d 92, 99 n.4 (Mo. Ct. App. 1995) (noting that “courts in other jurisdictions have uniformly refused to recognize clergy malpractice as a cause of action for sexual misconduct of a cleric”); *F.G. v. MacDonell*, 696 A.2d 697, 703 (N.J. 1997) (disapproving a clergy malpractice action on First Amendment grounds).

38. See *Schmidt v. Bishop*, 779 F. Supp. 321, 328 (S.D.N.Y. 1991).

Any effort by this Court to instruct the trial jury as to the duty of care which a clergyman should exercise, would of necessity require the Court or jury to define and express the standard of care to be followed by other reasonable Presbyterian clergy of the community. This in turn would require the Court and the jury to consider the fundamental perspective and approach to counseling inherent in the beliefs and practices of that denomination. This is as unconstitutional as it is impossible. It fosters excessive entanglement with religion.

Id.; see also *Gibson v. Brewer*, 952 S.W.2d 239, 249-50 (Mo. 1997) (en banc) (“In order to determine how a ‘reasonably prudent Diocese’ would act, a court would have to excessively entangle itself in religious doctrine, policy, and administration.”); *Evans*, 718 So. 2d at 291 (“Each court to consider the viability of a clergy malpractice claim has concluded the First

where there is doctrinally-based intrachurch disagreement concerning the nature of the pastoral function. In such cases, the court might very well have to adjudge correct, and thus lend the state's imprimatur to, one of the contending sides, a role generally forbidden by the precept that "[c]ourts are not arbiters of scriptural interpretation"³⁹ and specifically disavowed within the intrachurch property dispute cases.⁴⁰ These, moreover, are simply the problems that could arise with relatively conventional religions; one can imagine the devilish time a court might have attempting, for example, to formulate a standard for the reasonably prudent Satanist practitioner.

Realizing these problems, the New Jersey Supreme Court recently added its voice to the unanimous chorus of jurisdictions refusing to recognize the tort of clergy malpractice. Two concerns, in particular, animated the court's holding. First, a clergy malpractice claim "requires definition of the relevant standard of care. Defining that standard could embroil courts in establishing the training, skill, and standards applicable for members of the clergy in a diversity of religions with widely varying

Amendment bars claims for clergy malpractice because such a claim requires a court to determine 'whether the adherent of a particular faith has properly interpreted the tenets of that faith.'" (quoting *Dausch v. Rykse*, 52 F.3d 1425, 1432 (7th Cir. 1994) (Ripple, J., concurring in part and dissenting in part in the judgment)); *In re Pleasant Glade Assembly of God*, 991 S.W.2d at 89 (rejecting various tort claims partly because "[d]eciding whether [the religious defendants] acted negligently . . . would require an impermissible inquiry into whether they deviated from the standard of care of an ordinary Assembly of God practitioner"); *L.L.N. v. Clauder*, 563 N.W.2d 434, 441-42 (Wis. 1997).

[N]egligent supervision claims would require a court to formulate a 'reasonable cleric' standard, which would vary depending on the cleric involved, i.e., reasonable Presbyterian pastor standard, reasonable Catholic archbishop standard, and so on. Such individualized standards would be required because, as previously mentioned, church doctrines and practices are intertwined with the supervision and discipline of clergy.

Id. (citations omitted); see also James T. O'Reilly & Joann M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues*, 7 ST. THOMAS L. REV. 31, 46-47 (1994) ("Our pluralistic society dislikes having its neutral jurists place themselves in the role of a 'reasonable chief rabbi,' 'reasonable bishop,' etc., because of the degree of involvement that must accompany such a decisional framework for the civil tort judge."); cf. *Briggs & Stratton Corp. v. National Catholic Rptr. Publ'g Co.*, 978 F. Supp. 1195, 1198 (E.D. Wis. 1997) (noting, in a defamation case where plaintiffs allegedly suggested that defendants' conduct was inconsistent with Catholic teaching, that "[t]he First Amendment and applicable state law prevent the court from developing a 'reasonable Catholic' standard of care").

39. *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981).

40. See, e.g., *Jones v. Wolf*, 443 U.S. 595, 604 (1979) (holding that if "the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body"); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969) (noting that "First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice").

beliefs.”⁴¹ Second, “defining such a standard would require courts to identify the beliefs and practices of the relevant religion and then to determine whether the clergyman had acted in accordance with them.”⁴²

Similar or analogous reasoning has led many (though not all) courts also to reject claims against religious defendants for breach of fiduciary duty,⁴³ negligent hiring or

41. *F.G.*, 696 A.2d at 703.

42. *Id.*; see also *Nally v. Grace Community Church of the Valley*, 763 P.2d 948, 960 (Cal. 1988) (“[I]t would certainly be impractical, and quite possibly unconstitutional, to impose a duty of care on pastoral counselors.”), *cert. denied*, 490 U.S. 1007 (1989). For a free exercise critique of recognizing clergy malpractice, see *Destefano v. Grabrian*, 763 P.2d 275, 290 (Colo. 1988) (Quinn, C.J., specially concurring).

Legislative or judicial recognition of the so-called tort of “clergy malpractice” would be fundamentally flawed on two counts. First, it would result in secularizing various forms of sectarian religious counseling that are entitled to constitutional protection. Second, it would undoubtedly result in deterring some ministers, priests, and rabbis from engaging in marriage counseling in order to avoid any potential liability The resulting effect on the religious counselor’s right to engage in bona fide religious marriage counseling, independently of secular standards applicable to licensed professionals, would . . . fly directly in the face of the Free Exercise Clause of the First Amendment.

Id.

43. See, e.g., *Ivers v. Church of St. William*, No. C2-98-519, 1998 WL 887536, at *3 (Minn. Ct. App. Dec. 22, 1998).

We conclude that analysis of the threshold issue of whether a fiduciary relationship existed would require this court to define the scope of the duty, if any, owed to individuals by their clergy, a matter fundamentally connected to issues of church organization and governance. Because it would necessarily involve the court in excessive entanglement in church matters by evaluating religious tenets and internal affairs of the church and archdiocese, the Constitution precludes us from making such an analysis.

Id.; see also, *Doe v. Evans*, 718 So. 2d 286, 293 (Fla. Dist. Ct. App. 1998) (joining “those courts finding a First Amendment bar to a breach of fiduciary duty claim as against church defendants, concluding resolution of such a claim would necessarily require the secular court to review and interpret church law, policies, and practices”); *Amato v. Greenquist*, 679 N.E.2d 446, 454 (Ill. App. Ct. 1997) (holding that breach of fiduciary duty arising from a clergy-parishioner relationship is not actionable because “when a parishioner lodges such a claim, religion is not ‘merely incidental’ to a plaintiff’s relationship with a defendant, ‘it [is] the foundation for it.’ The fiduciary relationship is inescapably premised upon the cleric’s status as an expert in theological and spiritual matters.” (quoting *H.R.B. v. J.L.G.*, 913 S.W.2d 92, 99 (Mo. Ct. App. 1995))); *H.R.B.*, 913 S.W.2d at 98 (noting that courts rejecting a cause of action for breach of fiduciary duty against clergy or religious organizations concluded that “analyzing and defining the scope of fiduciary duty owed persons by their clergy . . . ‘would require the Court and the jury to consider the fundamental perspective and approach to counseling inherent in the beliefs and practices of that denomination’” (quoting *Schmidt v. Bishop*, 779 F. Supp. 321, 328 (S.D.N.Y. 1991))); *Schieffer v. Catholic Archdiocese*, 508 N.W.2d 907, 912 (Neb. 1993) (following *Schmidt* and rejecting the cause of action on constitutional grounds); *Langford v. Roman Catholic Diocese*, 677 N.Y.S.2d 436, 439 (N.Y. Sup. Ct. 1998) (rejecting a claim for breach of fiduciary duty because “it is impossible to show the existence of a fiduciary relationship without resort to religious facts”

retention or transfer,⁴⁴ negligent supervision,⁴⁵ tortious interference with contract,⁴⁶

and “[i]n order to consider the validity of plaintiff’s claims of dependency and vulnerability, the jury would have to weigh and evaluate, *inter alia*, the legitimacy of plaintiff’s beliefs, the tenets of the faith insofar as they reflect upon a priest’s ability to act as God’s emissary and the nature of the healing powers of the church.”) (emphasis in original).

44. See, e.g., *Ayon v. Gourley*, 47 F. Supp. 2d 1246, 1250 (D. Colo. 1998) (holding that a “negligent hiring claim would violate both the Free Exercise and Establishment Clauses” because “consideration of the hiring policies of the Archdiocese Defendants would inevitably require examination of church policy and doctrine”), *aff’d*, 185 F.3d 873 (10th Cir. 1999); *Isely v. Capuchin Province*, 880 F. Supp. 1138, 1150 (E.D. Mich. 1995) (noting that “[q]uestions of hiring and retention of clergy necessarily will require interpretation of church canons, and internal church policies and practices” and that “any inquiry into the decision of who should be permitted to become or remain a priest necessarily would involve prohibited excessive entanglement with religion”); *Schmidt v. Bishop*, 779 F. Supp. 321, 332 (S.D.N.Y. 1991).

[A]ny inquiry into the policies and practices of the Church Defendants in hiring or supervising their clergy raises . . . First Amendment problems of entanglement . . . which might involve the Court in making sensitive judgments about the propriety of the Church Defendants’ supervision in light of their religious beliefs. . . . Any award of damages would have a chilling effect leading indirectly to state control over the future conduct of affairs of a religious denomination, a result violative of the text and history of the establishment clause.

Id.; see also *Evans*, 718 So. 2d at 291 (holding that the First Amendment bars claims for negligent hiring and retention); *Gibson v. Brewer*, 952 S.W.2d 239, 247 (Mo. 1997) (en banc) (holding that adjudication of negligent hiring, ordination, and retention claims would violate the First Amendment); *Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W.2d 780, 791 (Wis. 1995) (holding that “the tort of negligent hiring and retention may not be maintained against a religious governing body due to concerns of excessive entanglement”), *cert. denied*, 516 U.S. 1116 (1996).

45. See, e.g., *Evans*, 718 So. 2d at 291 (holding that the First Amendment bars a negligent supervision claim); *Swanson v. Roman Catholic Bishop of Portland*, 692 A.2d 441, 444-45 (Me. 1997) (rejecting a negligent supervision claim on constitutional grounds); *Mulinix v. Mulinix*, No. C2-97-297, 1997 WL 585775, at *6 (Minn. Ct. App. Sept. 22, 1997) (refusing to adjudicate claims of negligent retention and supervision because they “are fundamentally connected to issues of church governance” and their adjudication “would necessitate inquiry into the church’s motives for not discharging [the defendant pastor], as well as how the church investigates and resolves complaints concerning clergy misconduct”); *Pritzlaff*, 533 N.W.2d at 791 (holding that “the tort of negligent training or supervision cannot be successfully asserted in this case because it would require an inquiry into church laws, practices and policies”); *Gibson*, 952 S.W.2d at 247 (“Adjudicating the reasonableness of a church’s supervision of a cleric—what the church ‘should know’—requires inquiry into religious doctrine. . . . [T]his would create an excessive entanglement, inhibit religion, and result in the endorsement of one model of supervision.”); *Heroux v. Carpentier*, No. C.A. PC 92-5807, 1998 WL 388298, at *9 (R.I. Super. Ct. Jan. 23, 1998) (refusing to adjudicate a claim of negligent “assignment, supervision, and control of religious subordinates” because “in order for it to determine whether or not the relation between a bishop and his priests is sufficiently agent-like to give rise to a common law duty to exercise reasonable care in the exercise of whatever supervisory authority the bishop has the Court is required to examine and analyze the rules, policies and doctrine of the Roman Catholic Church.”)

negligent infliction of emotional distress,⁴⁷ and defamation⁴⁸ or other

46. *See, e.g., Singleton v. Christ the Servant Evangelical Lutheran Church*, 541 N.W.2d 606, 614 (Minn. Ct. App.) (deciding not to permit such a claim by a terminated pastor against his synod), *cert. denied*, 519 U.S. 870 (1996)

[T]he court would have to consider whether the bishop and his assistants acted reasonably . . . [and] review of the duties of the bishop and his assistants, matters of church governance within the Synod, the relationship between the Church and the Synod, the Synod's obligation to provide pastoral care, the Synod's obligation to discipline its member churches for violations of the Synod's constitution, and the bishop's authority to settle disputes within the Synod's member churches.

Id. (also noting that "[t]hese matters are ecclesiastical concerns not reviewable under the First Amendment").

47. *See, e.g., Gibson*, 952 S.W.2d at 248-49 ("To determine whether the Diocese's responses to its members' claims were 'reasonable,' a court would inevitably judge the reasonableness of religious beliefs, discipline, and government. Applying a negligence standard to the actions of the Diocese in dealing with its parishioners offends the First Amendment."). Several courts have also refused to adjudicate claims of intentional infliction of emotional distress in such cases. *See, e.g., Evans*, 718 So. 2d at 293-94 (rejecting a claim of intentional infliction of emotional distress in part because it "would . . . be barred by the First Amendment"); *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996) ("Resolving whether Tilton has intentionally inflicted emotional distress through the making of insincere religious representations would inevitably require an inquiry into whether Tilton's religious beliefs are true or false.").

48. *See, e.g., Hutchison v. Thomas*, 789 F.2d 392, 393-96 (6th Cir.) (affirming dismissal of defamation-related wrongful termination claim on First Amendment grounds), *cert. denied*, 479 U.S. 885 (1986); *Klagsbrun v. Va'ad Harabonim of Greater Monsey*, 53 F. Supp. 2d 732, 741 (D.N.J. 1999) (concluding that the plaintiff's claims of defamation—including allegedly false statements by an association of rabbis that he committed bigamy (as a matter of Jewish law, not civil law), failed to comply with a rabbinical court order, and failed to submit to a rabbinical court's jurisdiction—"would require this court to undertake an examination of underlying religious doctrine or practice" and, "[a]ccordingly, jurisdiction must be declined"); *Farley v. Wisconsin Evangelical Lutheran Synod*, 821 F. Supp. 1286, 1288-90 (D. Minn. 1993) (dismissing a minister's defamation suit on First Amendment grounds); *O'Connor v. Diocese of Honolulu*, 885 P.2d 361, 368 (Haw. 1994) (refusing to adjudicate a defamation claim because "to determine the truth or falsity of the [allegedly defamatory] statements, a state court would have to inquire into church teachings and doctrine."). More specifically, the court noted:

[T]he secular law cannot determine: (1) 'criminal penal ecclesiastical' violations; (2) schism; (3) whether church law is violated by establishing a separate church; (4) whether one has misrepresented the Roman Catholic faith; (5) whether, in matters of church dogma, one is a fanatic or has a neolithic frame of mind; (6) whether one is duping the faithful; (7) whether one causes others to lose their souls; (8) whether one is disloyal to the Pope; or (9) whether one must be excommunicated to save other souls.

Id.; *see also Brazauskas v. Fort Wayne-S. Bend Diocese, Inc.*, 714 N.E.2d 253 (Ind. Ct. App. 1999) (holding that the trial court lacked subject matter jurisdiction over a defamation claim against religious defendants because its adjudication would have entailed "an impermissible scrutiny of religious doctrine" and noting more generally that "when officials of a religious organization state their reasons for terminating a pastoral employee in ostensibly ecclesiastical

tortious speech.⁴⁹ In addition, most courts appear to reject the idea that uniquely religious acts, such as excommunication or shunning or exorcism, should be actionable in tort,⁵⁰ although the permissibility of such claims would likely raise

terms, the First Amendment effectively prohibits civil tribunals from reviewing these reasons to determine whether the statements are either defamatory or capable of a religious interpretation related to the employee's performance"); *McManus v. Taylor*, 521 So. 2d 449, 451 (La. Ct. App. 1988) (sustaining defendants' exception of lack of subject matter jurisdiction over a defamation claim because its adjudication would require the "courts [to] investigate the propriety of proceedings conducted by [plaintiff's] church in the interpretation and application of church rules"); *Downs v. Roman Catholic Archbishop of Baltimore*, 683 A.2d 808, 811 (Md. Ct. Spec. App. 1996) (extending the prohibition of the intrachurch dispute cases to a defamation action brought by a former candidate for the priesthood); *Jeambey v. Synod of Lakes & Prairies*, No. CX-95-902, 1995 WL 619814, at *3 (Minn. Ct. App. Oct. 24, 1995) (holding that the plaintiff's "defamation claim requires an impermissible inquiry into church doctrine and discipline" and thus that "review of this claim is prohibited"); *Schoenhals v. Mains*, 504 N.W.2d 233, 236 (Minn. Ct. App. 1993) (holding that "[s]ince examination of the truth of [the defendant's] statements would require an impermissible inquiry into Church doctrine and discipline, the district court did not err in concluding that the defamation claim is precluded by the First Amendment"); *Jackson v. Presbytery of Susquehanna Valley*, 686 N.Y.S.2d 273, 274-75 (N.Y. Sup. Ct.) (noting that the "refusal to exercise jurisdiction over ecclesiastical-related matters has extended to allegations, such as here, of defamation" and ultimately refusing to exercise jurisdiction), *aff'd*, No. 2147, 1999 WL 978096 (N.Y. App. Div. Oct. 26, 1999); *Howard v. Covenant Apostolic Church, Inc.*, 705 N.E.2d 385, 388-89 (Ohio Ct. App. 1997) (rejecting church member's defamation claim—based on the defendants' alleged statements that the plaintiff "had lied, that he was in league with Satan, that he had been overtaken by a fall, that he was a defiler of the temple and an enemy of the Church, and that he was 'sleeping around'"—because "[t]he allegedly defamatory statements made by Church members, trustees, or agents in terminating appellant's membership in the Church . . . [were] inextricably intertwined with ecclesiastical or religious issues over which secular courts have no jurisdiction"), *appeal not allowed*, 688 N.E.2d 1043 (Ohio 1998); *Tran v. Fiorenza*, 934 S.W.2d 740, 743-44 (Tex. App. 1996) (dismissing a priest's defamation claim).

49. *See, e.g., Stansfield v. Starkey*, 269 Cal. Rptr. 337, 345 (Cal. Ct. App. 1990) (holding that a threat that one's relatives "would be damned in Hell forever" were one to leave the church will not be actionable if the speech, at bottom, is essentially a religious or theological assertion) (quoting *Molko v. Holy Spirit Ass'n*, 762 P.2d 46, 64 (Cal. 1988), *cert. denied*, 490 U.S. 1084 (1989)); *Snyder v. Evangelical Orthodox Church*, 264 Cal. Rptr. 640, 644 (Cal. Ct. App. 1989) (refusing to adjudicate a claim that plaintiff was threatened with the nonabsolution of his sins if he did not meditate in isolation for one week); *Smith v. Tilton*, No. 05-96-00071-CV, 1999 WL 649359, at *7-8 (Tex. Ct. App. Aug. 25, 1999) (affirming dismissal of negligent misrepresentation claim because the defendants-appellees' statements relating to past and future occurrences of miracles "constitute representations of appellees' religious beliefs," such that "the truthfulness or reasonableness of these statements is protected from judicial scrutiny by the First Amendment to the United States Constitution and article one, section six of the Texas Constitution").

50. *See, e.g., Paul v. Watchtower Bible & Trust Soc'y*, 819 F.2d 875, 878-83 (9th Cir.) (rejecting a variety of shunning-related tort claims by a disassociated Jehovah's Witness, holding that such claims would violate the federal and Washington state constitutions), *cert. denied*, 484 U.S. 926 (1987); *Grunwald v. Bornfreund*, 696 F. Supp. 838, 840-41 (E.D.N.Y. 1988) (rejecting tort action for excommunication because "[t]he mere expulsion from a

separate concerns and their disallowance may rest on other grounds.⁵¹

religious society, with the exclusion from a religious community, is not a harm for which courts can grant a remedy"; "[i]n this case, plaintiff asks the Court to do something it is not able to do either as a matter of federal jurisprudence or under the first amendment: decide whether plaintiff should be excommunicated from his religious community for prosecuting this suit against defendants"; *Lewis v. Holy Spirit Ass'n for Unification of World Christianity*, 589 F. Supp. 10, 12 (D. Mass. 1983) (rejecting claims of tortious brainwashing and indoctrination in part because "[i]ndoctrination and initiation procedures and conditions of membership in a religious organization are generally not subject to judicial review"); *In re Pleasant Glade Assembly of God*, 991 S.W.2d 85, 89 (Tex. Ct. App. 1998) (refusing to adjudicate various tort claims arising from an allegedly wrongful attempt to cast out demons, not only because church doctrine would be centrally implicated but also because the emotional distress claims involved "intangible or emotional harm," which "cannot ordinarily serve as a basis for maintaining a tort cause of action against a church for religious practices"), *order stayed on other grounds*, No. 2-98-222-CV, 1999 WL 13249 (Tex. App. Jan. 13, 1999); *see also United Baptist Church, Inc. v. Holmes*, 500 S.E.2d 653, 654 (Ga. Ct. App. 1998).

The courts of Georgia under the First Amendment of the Constitution of the United States and Art. I, Sec. I, Par. IV of the 1983 Constitution of Georgia are prohibited from determining issues of expulsion of members, pastors, and the internal procedures of a religious entity because "[i]nextricably entangled is whether the priest's performance of his duties as a priest met the requirements of his church as measured by ecclesiastical concerns." Likewise, "the validity of the expulsion of the [plaintiff] as [a member] of the church . . . grow[s] out of a controversy relating to the faith, teaching, doctrine, and discipline of the church"; therefore, courts are prohibited from inquiring into expulsion of members of a religious entity.

Id. (alterations and emphasis in original) (citations omitted) (quoting *McDonnell v. Episcopal Diocese*, 381 S.E.2d 126, 128 (Ga. Ct. App. 1989), and *Stewart v. Jarriel*, 59 S.E.2d 368, 370 (Ga. 1950), respectively). *But see* *Lightman v. Flaum*, 687 N.Y.S.2d 562 (N.Y. Sup. Ct. 1999) (holding that the plaintiff could pursue a claim against her rabbi for breach of the clergy-penitent privilege); *Bear v. Reformed Mennonite Church*, 341 A.2d 105, 107 (Pa. 1975) (allowing suit for shunning to proceed). The court observed that the challenged conduct may be an excessive interference within areas of "paramount state concern," i.e. the maintenance of marriage and family relationship, alienation of affection, and the tortious interference with a business relationship, which the courts of this Commonwealth *may* have authority to regulate, even in light of the "Establishment" and "Free Exercise" clauses of the First Amendment.

Id. (emphasis in original).

51. To a large extent, such claims are barred under the third component of the general prohibition, which typically requires deference to ecclesiastical decisions. *See, e.g., Howard*, 705 N.E.2d at 387-88. One additional concern, however, particularly in regard to claims of wrongful excommunication or expulsion, is that church or congregational membership would likely have to be recognized as a legal right or interest. Not only would enforcement of this right potentially encroach upon the autonomy of religious institutions and entail examination of whether the church complied with its own doctrines of membership, *see Martinez v. Primera Asamblea de Dios, Inc.*, No. 05-96-01458-CV, 1998 WL 242412, at *3 (Tex. App. May 15, 1998) (holding that a church may not be held liable for wrongful termination of membership because such a claim would intrude on the church's internal governance and would require the court "to interpret Christian scriptures rather than neutral principles of law," although allowing claims for negligent hiring, supervision, and training of a church

Having noted what appears to be the majority position, it should further be pointed out that the courts are far from uniform in their refusal to adjudicate tort actions against religious entities. With the exception of clergy malpractice, in fact, courts are otherwise divided,⁵² although again the general rule appears to be one of nonadjudicability. The following Part will examine not only the potential sources of this division, but also the forces that may increasingly undermine the extant rule.

II. THE CAUSES OF ITS POTENTIAL DEMISE IN THE TORT CONTEXT

Constitutional protection of an interest or class, once accorded or recognized, is not often categorically eliminated. Though the scope of protection may regularly change, even dramatically,⁵³ it is much rarer that an entire species of liberty, or an entire class

elder), but it could also raise a more basic issue concerning the cognizability of religious but nonconstitutional interests. *See generally* *Fowler v. Bailey*, 844 P.2d 141, 143-46 (Okla. 1992) (stating these concerns and the general rule of nonadjudication, though noting a few contrary rulings).

A "civil or property right" that justifies the exercise of civil judicial power has long been distinguished from ecclesiastical or "spiritual" rights that civil courts do not adjudicate. Civil courts in this country recognize that they have no ecclesiastical jurisdiction, and church disciplinary decisions cannot be reviewed for the purpose of reinstating expelled church members.

Id. at 144 (footnote omitted).

52. *See, e.g., Doe v. Hartz*, 970 F. Supp. 1375, 1431-32 (N.D. Iowa 1997) (citing cases and noting the "split of authority" over the adjudicability of negligent supervision claims), *rev'd in part and vacated in part on other grounds*, 134 F.3d 1339 (8th Cir. 1998); *Moses v. Diocese of Colo.*, 863 P.2d 310, 321 (Colo. 1993) (holding that the First Amendment does not bar a breach of fiduciary duty claim insofar as church doctrine need not be interpreted), *cert. denied*, 511 U.S. 1137 (1994); *Doe v. Evans*, 718 So. 2d 286, 291 (Fla. Dist. Ct. App. 1998) (recognizing that "there also exists authority finding no bar to a claim for negligent hiring, retention, and supervision" although noting that "this result most often appears in the context of criminal sexual conduct" (citing *Nutt v. Norwich Roman Catholic Diocese*, 921 F. Supp. 66 (D. Conn. 1995)), *review granted*, 735 So. 2d 1284 (Fla. 1999); *Amato v. Greenquist*, 679 N.E.2d 446, 454 (Ill. App. Ct. 1997) (noting conflicting cases on the adjudicability of breach of fiduciary duty claims); *Konkle v. Henson*, 672 N.E.2d 450 (Ind. Ct. App. 1996); *Mrozka v. Archdiocese of St. Paul & Minneapolis*, 482 N.W.2d 806 (Minn. Ct. App. 1992); *Gibson v. Brewer*, 952 S.W.2d 239, 248 (Mo. 1997) (en banc) (listing cases divided over whether to recognize negligent supervision claims); *F.G. v. MacDonell*, 696 A.2d 697, 702 (N.J. 1997) (noting cases in which various tort claims against religious entities have been allowed); *Kenneth R. v. Roman Catholic Diocese*, 654 N.Y.S.2d 791 (N.Y. App. Div.), *cert. denied*, 118 S. Ct. 413 (1997), *leave to appeal dismissed*, 690 N.E.2d 492 (N.Y. 1997); *Jones v. Trane*, 591 N.Y.S.2d 927 (N.Y. Sup. Ct. 1992); *Gallas v. Greek Orthodox Archdiocese*, 587 N.Y.S.2d 82 (N.Y. Sup. Ct. 1991); *Erickson v. Christenson*, 781 P.2d 383 (Or. Ct. App. 1989), *appeal dismissed*, 817 P.2d 758 (Or. 1991).

53. For example, compare *Employment Div. v. Smith*, 494 U.S. 872 (1990) (holding that neutral, generally applicable legal burdens on religious practice should be subjected to minimal scrutiny), with *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding without qualification that such burdens should be subjected to strict scrutiny). Also, compare *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (holding that pre-viability legal restrictions on

of claimants, is altogether removed from the realm of constitutional cognizance.⁵⁴ Stare decisis, if nothing else, dictates such conservatism.⁵⁵ In turn, this inertial tendency suggests that any claim that a principle will be largely if not entirely abrogated should be presumed incorrect at the outset, and that one or more very good reasons must be offered in support of the claim.

This Part of the Article shall present a multitude of factors that, taken together, do point towards the eventual erosion or abrogation of the constitutional prohibition on subjecting religious entities to standard forms of tort adjudication. For analytical purposes, these factors have been divided into three categories: cultural, institutional, and doctrinal or theoretical.

A. Cultural Factors

Given the potential dynamic between cultural norms and legal rules, any projection into the legal future must take account of such norms and their likely trajectories. Generally speaking, in order for legal change to occur, the legal or political processes must be engaged by one or more external stimuli, such as the institution of litigation, a proposal of legislation, a shift in public attitudes, pressure from the media, the lobbying of a cause, and the like.⁵⁶ Here, the most obvious external stimulus is the private institution of civil litigation against religious entities. Indeed, while there is much debate over whether or not American society has in general become increasingly litigious, especially in regard to tort actions, such actions specifically against religious entities and individuals do appear to be on the rise.⁵⁷

abortion should be subjected to an intermediate—though nonbalancing—undue burden standard), with *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 427 (1983) (holding that “restrictive state regulation of the right to choose abortion . . . must be supported by a compelling state interest”), *overruled in part by Casey*, 505 U.S. at 882.

54. The liberty of contract recognized in such cases as *Lochner v. New York*, 198 U.S. 45 (1905), and since repudiated, see *Casey*, 505 U.S. at 861 (recognizing the repudiation), provides one example.

55. See Hugh Baxter, *Managing Legal Change: The Transformation of Establishment Clause Law*, 46 UCLA L. REV. 343, 346 (1998).

While as the Court has said repeatedly, “[s]tare decisis is not an inexorable command,” and while the Court on occasion overrules its own decisions, still, stare decisis limits—or at least influences—the Court’s transformation of the law. In some cases when the Court’s inclination toward legal change is weak, stare decisis likely prevents the Court from overruling. And even when the impulse to change is stronger, overruling has costs for the prevailing majority—perhaps impaired relations with fellow Justices who would have adhered to the precedent, the sting of a dissenting opinion, professional criticism, and sometimes public disapproval.

Id. (alteration and emphasis in original) (footnotes omitted) (quoting *Agostini v. Felton*, 521 U.S. 203, 235 (1997)).

56. See generally LEE EPSTEIN & JOSEPH F. KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY* ch.2 (1992) (discussing the “agents of legal change” within the context of Supreme Court decisionmaking).

57. See, e.g., John H. Arnold, *Clergy Sexual Malpractice*, 8 U. FLA. J.L. & PUB. POL’Y 25, 26 (1996) (noting “the outpouring, or ‘epidemic’ as one legal observer has called it, of

This increase in and of itself is significant, especially if it serves to desensitize judges, juries, and other potential litigants to the acceptability of religious entities as defendants. Equally significant, however, are a host of accompanying phenomena that may serve either as causes of the increase in litigation, as forces that could transform the outcome of this litigation, or as both. At the causal level, for example, it has been suggested that plaintiffs may simply be less reluctant than in the past to bring suits against religious defendants,⁵⁸ perhaps because churches and clergy no longer stand in the same revered position vis-à-vis parishioners⁵⁹ or because the availability of insurance makes suing one's church a less unpalatable undertaking.⁶⁰ Regardless of its origins, this new willingness to bring suit is important in at least two respects. First and most obvious, it increasingly places the relevant issues—such

lawsuits against clergymen and their churches") (footnote omitted) (quoting ROBERT W. McMENAMIN, *CLERGY MALPRACTICE* 5 (1986)); O'Reilly & Strasser, *supra* note 38, at 32 ("With increasing frequency, victims of sexual abuse have targeted churches in lawsuits alleging sexual abuse by clergy and claiming direct or vicarious liability of the affiliated religious organization."); Marc L. Terry, *Disclosure of Church Archives in Cases of Criminal Misconduct by Clergymen*, 1 SUFFOLK J. TRIAL & APPELLATE ADVOC. 95, 95 (1995) ("Throughout the past decade, an alarming number of allegations of sexual misconduct have been made against Catholic priests."); David J. Young & Stephen W. Tigges, *Into the Religious Thicket—Constitutional Limits on Civil Court Jurisdiction over Ecclesiastical Disputes*, 47 OHIO ST. L.J. 475, 475 (1986).

It has been widely noted that individuals and associations alike are turning to the civil courts with increasing frequency for resolution of their disputes. Religious organizations have not been excluded from this trend. As a result, church counsel increasingly are being called upon to defend their clients in litigation which quite often raises issues at the heart of church organization and government.

Id. (citing examples); see also Lindsey Rosen, Recent Decision, *In Bad Faith: Breach of Fiduciary Duty by the Clergy*—F.G. v. MacDonell, 71 TEMP. L. REV. 743, 743 (1998) (observing that "[w]ithin the past decade . . . the frequency of lawsuits arising out of pastoral counseling has risen dramatically").

58. See, e.g., Lee W. Brooks, Note, *Intentional Infliction of Emotional Distress by Spiritual Counselors: Can Outrageous Conduct Be "Free Exercise"?*, 84 MICH. L. REV. 1296, 1300 n.12 (1986) ("There was always the reluctance to sue a member of the clergy," says Lee Boothby, a Michigan attorney . . . 'Lawyers wouldn't even take such cases. That inhibition has left completely.'") (quoting Susan Carey, *Faith and the Law*, WALL ST. J., Apr. 9, 1985, at 1)).

59. See Arnold, *supra* note 57, at 26 (noting "the falling esteem of the clergy, which has created a social climate conducive to the reporting of sexual abuse").

60. See Greg Slater, Note, *Nally v. Grace Community Church of the Valley: Absolution for Clergy Malpractice?*, 1989 BYUL. REV. 913, 936 n.130 ("Perhaps it could be argued that clergy malpractice insurance relieves the fear of liability; yet, a deep pocket like Church Mutual Insurance Company may persuade plaintiffs to overcome their reluctance to sue."). The availability of insurance was certainly a factor in the decline of the charitable immunity doctrine. See Daniel A. Barfield, Note, *Better To Give Than To Receive: Should Nonprofit Corporations and Charities Pay Punitive Damages?*, 29 VAL. U. L. REV. 1193, 1195-96 (1995) (noting that "[a]mong the reasons cited for the demise of the doctrine of charitable immunity were the development of an advanced insurance industry and the growth of the nonprofit sector" and that "[c]ourts reasoned that any burden placed on charities because of tort liability could be alleviated if charities purchased insurance").

as reasonableness of conduct, potential liability, and deterrence—before the legal system, and specifically before judges and possibly juries. Second, it is self-generating: the perceived willingness of some victims to bring suit may prompt still others themselves to bring suit, especially if plaintiffs do periodically prevail.

Another phenomenon, one that is arguably both causal and transformative, is the seemingly disproportionate media attention given to alleged misconduct by clergy and their institutions, especially where the misconduct appears particularly outrageous.⁶¹ While media coverage of religion in general has often been criticized,⁶² there certainly has been no shortage of coverage in cases of alleged clergy wrongdoing. Far from being relegated to the religion section of the newspaper's backpages, "[a]ccounts of clergy misconduct have been among the most challenging and sensational revelations in the media in the recent past."⁶³ Not only may such media attention spur potential plaintiffs to file suit (though it may discourage others),⁶⁴ it may also serve to "put pressure on the courts and the churches to do what is necessary to alter pastoral conduct."⁶⁵ This pressure may be either direct, whereby media accounts by their own force influence judges, or indirect, whereby the media influences public attitudes, which in turn affect judicial decisionmaking.

Related to both plaintiff willingness and media attention is an apparent growing

61. See, e.g., Arnold, *supra* note 57, at 26 (noting the "media attention given to certain cases"); O'Reilly & Strasser, *supra* note 38, at 31 ("Sexual misconduct among clergy members . . . [has been] made more evident in the 1990s by dramatic news reporting and high-profile litigation demands. Revelation is no longer just an uplifting part of the New Testament; revelation is a tabloid tactic for uplifting television ratings and newspaper sales by assailing massive sexual scandals in the churches."); Janice D. Villiers, *Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship*, 74 DENV. U. L. REV. 1, 2 (1996) (noting that "[r]ecently, clergy accused of pedophilia have garnered considerable press attention").

62. See, e.g., David Shaw, *The Pope and the Press: Too Much Sensationalism, Too Little Substance?*, L.A. TIMES, Apr. 18, 1995, at A1 (documenting alleged distortion of the Roman Catholic Church by American media in Part Three of a four-part series); David Shaw, *The Pope and the Press: Too Much Sensationalism, Too Little Substance?*, L.A. TIMES, Apr. 16, 1995, at A1 (similar; noting critics' claim that the media coverage of the Roman Catholic Church exposes "structural flaws in the news media" such as "a propensity for sensationalism, conflict and oversimplification and an ignorance of (and often hostility toward) religion in general and Catholicism in particular") (Part One of four-part Series). For a more general examination of media reporting of religion, undertaken by the Freedom Forum First Amendment Center of Vanderbilt University, see JOHN DART & JIMMY ALLEN, BRIDGING THE GAP: RELIGION AND THE NEWS MEDIA (1993).

63. David V. White, *When the Wolf Tends the Flock: Clergy Misconduct and Marital Counseling*, 82 ILL. B.J. 194, 194 (1994).

64. See O'Reilly & Strasser, *supra* note 38, at 37 (noting that "[t]he publicity surrounding major abuse cases and the success of plaintiffs has empowered victims to . . . speak out and pursue civil actions").

65. Constance Frisby Fain, *Clergy Malpractice: Liability for Negligent Counseling and Sexual Misconduct*, 12 MISS. C. L. REV. 97, 118 (1991) ("Perhaps continued filing of clergy malpractice claims and persistent, unrelenting media reports addressing this issue will put pressure on the courts and the churches to do what is necessary to alter pastoral conduct.") (footnote omitted).

public sympathy for the victims of clergy exploitation—and possibly a corresponding antipathy towards the clergy who commit such exploitation and the religious institutions that appear, by their action or inaction, to be facilitating it if not actually covering it up.⁶⁶ We live, it would seem, in an era of heightened sensitivity to those who claim injury or some other victimlike status, and our chosen means of redress for alleged past harm is compensation, achieved by holding the tortfeasor monetarily liable.⁶⁷ At the same time, we appear to live in an era in which many institutions—including religious institutions—command diminished respect and in which their authority is often greeted with skepticism.⁶⁸ Together, these two cultural trends make it especially difficult for one to persuasively insist, on constitutional grounds or otherwise, that religious institutions ought to be effectively shielded from the claims of their tort victims.

Finally—and related to all three phenomena thus far documented—the public and the media appear generally to undervalue, if not altogether overlook, the First Amendment issues at stake in the adjudication of tort actions against religious defendants. Few media reports address, with any sensitivity or sophistication at least, the many potential constitutional or theological aspects of such tort actions, focusing instead upon the grave, sometimes lurid nature of the harm allegedly inflicted or,

66. See Lisa M. Smith, *Lifting the Veil of Secrecy: Mandatory Child Abuse Reporting Statutes May Encourage the Catholic Church to Report Priests Who Molest Children*, 18 LAW & PSYCHOL. REV. 409, 412 (1994); Villiers, *supra* note 61, at 2 (claiming that “clergy accused of pedophilia have garnered . . . the ire of the general public”).

67. See Bernard E. Boland, *A New Professional Identity for Bench and Bar: Pour Rambo et Snidely un Képi Blanc*, 25 WM. MITCHELL L. REV. 117, 123 (1999) (remarking that “[s]tate legislatures clamor to create a cause of action for every actual and imagined insult and wrong, and scores of heretofore-undiscovered victims have emerged in every walk and endeavor”); cf. Michael E. Solimine, *Activism and Politics on State Supreme Courts*, 57 U. CIN. L. REV. 987, 989-90 (1989) (“With the exception of libel law (informed by First Amendment concerns), the post-World War II tort law revolution has been inexorably pro-recovery. Privilege has fallen, immunities abrogated, and strict liability imposed.”) (reviewing G. ALAN TARR & MARY C.A. PORTER, *STATE SUPREME COURTS IN STATE AND NATION* (1988)).

68. See Boland, *supra* note 67, at 119, 128 (noting “a popular and ephemeral nihilism that has afflicted all of our professions and institutions” and commenting that “no institution or profession has fared well over the past thirty years—the government, the press, religion and education have all taken severe hits in public confidence”); Spencer Lewerenz, *Choice of a New Generation?*, CRISIS, Apr. 1999, at 22, 24 (arguing that “[p]op culture’s revolutionary challenge of religious authority . . . must be acknowledged by religious institutions” and that the Catholic Church, for one, “does not hold the political and cultural stature that she once did”) (discussing TOM BEAUDOIN, *VIRTUAL FAITH: THE IRREVERENT SPIRITUAL JOURNEY OF GENERATION X* (1998)); Harrison Sheppard, *American Principles and the Evolving Ethos of American Legal Practice*, 28 LOY. U. CHI. L.J. 237, 250 (1996) (noting “the erosion of public respect for lawyers and loss of confidence in our legal institutions”); Bradley A. Smith, *Real and Imagined Reform of Campaign Corruption*, 6 CORNELL J.L. & PUB. POL’Y 141, 141 (1996) (remarking, based on survey data, that “public confidence in governmental institutions continues to decline”) (reviewing LARRY J. SABATO & GLENN R. SIMPSON, *DIRTY LITTLE SECRETS: THE PERSISTENCE OF CORRUPTION IN AMERICAN POLITICS* (1996)). See generally Leslie McAneny, *Public Confidence in Major Institutions Little Changed from 1995* (Gallup Poll, June 6, 1996) (on file with the *Indiana Law Journal*).

where liability is imposed, upon the size or impact of the verdict.⁶⁹ Concomitantly, organizations such as the American Civil Liberties Union that normally might alert the media to the constitutional dimensions of legal controversies seem, for whatever reason, to be largely if not entirely absent from the picture.⁷⁰ The result is that the public appears to remain unaware of, and in turn unconcerned about, the significant First Amendment principles implicated by the adjudication of certain tort actions against religious defendants. Arguably it is not that the public might simply disagree with the notion of a constitutional bar on tort actions; it is that the public does not see the constitutional issue at the outset.⁷¹

B. Institutional Factors

Having addressed the cultural factors that may both explain and precipitate a movement towards initiating tort actions against religious entities, it is necessary to address as well certain institutional factors that will affect the fate of such actions once they enter the legal system, and specifically the judicial forum. For whatever else may be said about this forum, from an institutional standpoint there is surely

69. See, e.g., *Dallas Diocese Ordered To Pay \$120 Million in Priest Sex Case*, MILW. J.-SENTINEL, July 25, 1997, at A8 (reporting that a suit against the Roman Catholic Diocese of Dallas by former altar boys produced "the largest verdict of its kind"); *Sexual Abuse Claim Leads to Auction at Church*, MILW. J.-SENTINEL, May 16, 1998, at A5 (reporting that the Redeemer Lutheran Church of Duluth, Minnesota, "was forced to go to auction after the Minnesota Supreme Court ordered the church to pay [a victim of pastoral sexual abuse] more than \$800,000 and the church's insurance company would pay only \$215,000").

70. Indeed, the ACLU's stances in related cases indicates a potential insensitivity to such issues. See, e.g., *South Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch.*, 696 A.2d 709, 714 (N.J. 1997) (noting the ACLU's position that requiring a Diocese to bargain collectively would not violate the Diocese's liberty under the Free Exercise Clause and would not cause excessive entanglement under the Establishment Clause); *Newport Church of the Nazarene v. Hensley*, 983 P.2d 1072 (Or. Ct. App. 1999) (reviewing a church-autonomy challenge to a state's inclusion of a minister within the unemployment compensation system, in which the ACLU Foundation of Oregon sided not with the church but with the claimant); cf. Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247, 300 n.290 (1994) (noting "[t]he ACLU's tendency to advocate highly secularist and separationist readings of the First Amendment").

71. In this respect, the bar is less like the school prayer rulings, of which the public generally disapproves but to which the public seems not to deny there is a constitutional dimension, and more like the flag desecration rulings, of which the public not only disapproves but to which it often seems not to perceive a constitutional dimension at all. Even many courts prior to *Texas v. Johnson*, 491 U.S. 397 (1989), and *United States v. Eichman*, 496 U.S. 310 (1990), both of which held that laws prohibiting flag desecration were impermissibly content-based, did not conceptualize flag desecration as speech or its prohibition as unconstitutionally censorious. See Eric Alan Isaacson, *The Flag Burning Issue: A Legal Analysis and Comment*, 23 LOY. L.A. L. REV. 535, 549 n.98 (1990) (listing cases).

nothing neutral about it. As with any other forum for resolution, the judicial branch possesses its own institutional characteristics, which in turn affect the handling of matters that come before it.⁷²

Two such characteristics, one narrow and one broad, will be noted here. First is the simple fact that most such actions are brought before state judges, not federal judges. Because the typical profile of these cases involves a plaintiff suing a defendant of the same state under state tort law, the venue is virtually always a state court. At the risk of reawakening the ever-awkward issue of federal-state judicial parity, however, this fact should generate serious concern that (at least relative to federal court) the influence of public attitudes and other cultural forces documented earlier may be heightened and the sensitivity to the constitutional issues may be diminished.

The concern about relative public influence on state court decisionmaking is longstanding and persists largely because of the electoral or political accountability of most state judges in comparison to Article III federal judges, the latter of whom enjoy life tenure and secure compensation.⁷³ This is not to suggest that state courts cannot or do not periodically render publicly or politically unpopular decisions. Rather it is a matter of degree, one that may be significant in close cases where external forces are strong.⁷⁴ The other concern—diminished state court sensitivity to constitutional issues—is somewhat more controversial because it questions the competence of state judges above and beyond the institutionally determined trait of

72. See generally Jon O. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CAL. L. REV. 200, 208-14 (1984) (discussing “values that concern the judge’s conception of the role of the courts and other sources of law, the judge’s view of the federal system, and the judge’s informed sense of the process of adjudication”). If there is “neutrality,” particularly in relation to other arms of the government, it inheres in the judicial obligation of impartiality. See, e.g., MODEL CODE OF JUDICIAL CONDUCT Canons 2B, 2C, 3A(1), 3C (1997). But this obligation does not reach deeper cultural norms, such as those discussed in the previous Part, that may nevertheless greatly influence the interpretation and application of legal principles.

73. See, e.g., Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1127-28 (1977); Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329, 333-36 (1988); see also Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 686 (1987) (noting that, in comparison to federal judges, “[s]tate judges . . . may . . . be subject to majoritarian political pressure”).

74. See Neuborne, *supra* note 73, at 1119-20 (suggesting that “given the institutional differences between the two benches, state trial judges are less likely to resolve arguable issues in favor of protecting federal constitutional rights than are their federal brethren”); see also Susan N. Herman, *Why Parity Matters*, 71 B.U. L. REV. 651, 654 (1991) (noting that the Supreme Court has never actually stated that federal and state courts are truly equivalent to one another, but has merely adopted a presumption that the latter are sufficient).

There is, to this author’s knowledge, no clear, empirical evidence of this phenomenon occurring in tort cases against religious entities. And certainly there are cases of this sort in which state courts, on constitutional grounds, have ruled against adjudication. The claim, rather, is an inferential one, taking into account all of the circumstances and forces affecting the judicial process, including the larger public’s apparent undervaluation of the constitutional concerns at stake.

accountability. It, too, should remain a genuine concern, however. As Professor Burt Neuborne recently argued, "in those areas of constitutional law where existing Supreme Court doctrine holds open the chance of doctrinal growth, . . . a relative institutional advantage for the . . . [constitutional claimant] exists in federal court; an advantage resulting from a mix of political insulation, tradition, better resources and superior professional competence."⁷⁵

As for tort actions against religious defendants, these concerns appear to be justifiable indeed. Given the cultural context depicted above, the constitutional issues raised in such actions are arguably the sort that would be at risk within an institutional context that is relatively vulnerable to public and political pressures.⁷⁶ An examination of the case law, moreover, reveals that some state courts do seem to view the adjudicability of such actions as a quasi-constitutional or prudential matter—one that can permissibly vary from jurisdiction to jurisdiction, for example⁷⁷—rather than a bona fide constitutional issue generating serious First

75. Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DEPAUL L. REV. 797, 799 (1995) (footnote omitted); see also Zeigler, *supra* note 73, at 686 (noting that, in comparison to federal judges, "[s]tate judges are not uniformly well qualified" and "may lack expertise in federal law"). But cf. Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 302 (1988).

In a nation with fifty state court systems and ninety-one federal districts, it is likely that some state courts will be superior to the federal courts in protecting individual rights, while in other areas, the state courts will be inferior to the federal judiciary. In fact, in most areas, the courts probably vary depending on the particular issue; a state court might be better in upholding some constitutional rights, but worse as to others.

Id.; see also Solimine, *supra* note 67, at 1003 (arguing that "state supreme courts are dealing with federal rights increasingly and responsibly").

76. Cf. Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths"*, 34 WM. & MARY L. REV. 579, 677 (1993) (noting that when a tort of intentional infliction of emotional distress action "is brought by a plaintiff and the allegedly 'outrageous' conduct is religiously motivated, an inevitable clash of values emerges: the communitarian values of tort law, committed to enforcing societal norms of acceptability, versus the defendant's right to free exercise of religion and society's strong interest in tolerating religious diversity").

77. In general, one's constitutional rights—such as incorporated Bill of Rights liberties—are supposed to be relatively uniform among jurisdictions. Cf. *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1207 (5th Cir. 1977) (en banc) (noting that "[t]rue liberty rights do not flow from state laws" but instead "have a more stable source in our notions of intrinsic human rights"), *cert. denied*, 437 U.S. 910 (1978); Kit Kinports, *The Buck Does Not Stop Here: Supervisory Liability in Section 1983 Cases*, 1997 U. ILL. L. REV. 147, 185 (remarking that "[t]he nature of a plaintiff's constitutional rights should not vary from jurisdiction to jurisdiction"). See generally Donald L. Beschle, *Uniformity in Constitutional Interpretation and the Background Right to Effective Democratic Governance*, 63 IND. L.J. 539 (1988). There are, however, at least two exceptions. The first is when constitutionality turns in part on community standards. See, e.g., *Miller v. California*, 413 U.S. 15, 24 (1973) (holding that whether expression is constitutionally obscene is to be determined partly by the application of "contemporary community standards"); Neil Coleman McCable, *Legislative Facts as Evidence in State Constitutional Search Analysis*, 65 TEMP. L. REV. 1229, 1243-44 (1992) (addressing this

Amendment concerns.⁷⁸ That the issue is often raised essentially as a defense within an ongoing, otherwise ordinary tort suit probably decreases the likelihood that these constitutional concerns will be accorded full recognition and only serves to reinforce in the judges' minds the propriety of employing their traditional case-by-case, particularist method of analysis.⁷⁹ After all, viewed from a pure tort perspective—especially given the goals of compensation and deterrence—there is

aspect of the obscenity test). The second is when constitutionality turns on legal categories, such as property or contract, that are largely a matter of state definition. *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-31 (1992) (holding that a regulation that results in a total deprivation of economically beneficial use of one's property will give rise to a compensable taking under the Fifth and Fourteenth Amendments unless the state can demonstrate that the regulated activity would constitute a prohibitable nuisance under the state's pre-existing law of property); Michael C. Blumm, *Property Myths, Judicial Activism, and the Lucas Case*, 23 ENVTL. L. 907, 914-15 (1993) (addressing the potential for interstate variation).

78. *See C.J.C. v. Corporation of the Catholic Bishop*, 985 P.2d 262, 278, 280-81 (Wash. 1999) (Madsen, J., concurring in part and dissenting in part) (criticizing the majority for "fail[ing] to recognize the First Amendment implications of its decision" finding tort liability and for "miss[ing] the constitutional dilemma"); *Swanson v. Roman Catholic Bishop*, 692 A.2d 441, 444, 445 (Me. 1997) (concluding that some courts finding no First Amendment problem with entertaining negligent supervision claims "have not fully addressed the fundamental [constitutional] issue" and that courts allowing such claims to proceed where the church had actual notice of risk "have failed to maintain the appropriate degree of neutrality required by the United States . . . Constitution"). Examples from related contexts include *Konkle v. Henson*, 672 N.E.2d 450, 456 (Ind. Ct. App. 1996). The court observed:

[W]ith regard to Konkle's claim under the doctrine of respondeat superior, the Church Defendants cite no authority to support their contention that the First Amendment prohibits such claims nor does our research reveal such authority. Instead, courts apply traditional tort law to the claims and determine whether the minister was acting within the course and scope of his employment when the tort occurred. Thus, we conclude that Konkle's respondeat superior claims are not barred by the First Amendment.

Id.; *see also Khmer Krom Buddhist Ass'n v. Nay*, No. 21525-0-11, 1999 WL 257420, at *2 (Wash. Ct. App. Apr. 30, 1999) (Seinfeld, J., concurring) (noting in a property and contract case the rule against doctrinal entanglement and contending that "the trial court strayed impermissibly into doctrinal issues when it concluded that Buddhist law and tradition 'requires a panel of senior monks to preside over the issue of removal or replacement of the Abbot or chief monk,'" but then deeming the violation "harmless" because it was unnecessary to the trial court's legal conclusion), *review denied*, 138 Wash. 2d 1020 (Wash. 1999). In this regard, it is interesting to note that at least one federal court expressly eschewed reliance on state court decisions in favor of federal decisions. *See Ayon v. Gourley*, 47 F. Supp. 2d 1246, 1248 & n.1 (D. Colo. 1998) (noting that "caselaw from the state of Colorado on the First Amendment does not constrain this Court in any way" and "[t]he fact that the Colorado state courts have taken an extremely expansive view of the claims allowed against religious organizations is not even particularly persuasive in light of the analysis by federal courts on this issue" and that, "[l]ikewise, the Court is not inclined to place any emphasis on any of the many other state court cases cited by the parties"), *aff'd*, 185 F.3d 873 (10th Cir. 1999).

79. *See generally* Frederick Schauer, *Prediction and Particularity*, 78 B.U. L. REV. 773, 786-87 (1998) (discussing the particularist approach of Jerome Frank).

little about religious defendants indicating that their conduct should be outside of the law's reach.⁸⁰ And the fact that the general rule presently appears to be against adjudicability does not mean that any given court will follow the rule, particularly given the existence of contrary extrajurisdictional precedent for most tort causes of action.⁸¹

80. See, e.g., *Konkle*, 672 N.E.2d at 456 (concluding, in a clergy sexual abuse case, that the relevant conduct was secular, not religious). The court noted:

The protection of society requires that religious organizations be held accountable for injuries they cause to third persons. Accordingly, we conclude that *Konkle's* claim is not barred by the First Amendment. To hold otherwise would be to extend the protections beyond that included within the First Amendment and cloak churches with an absolute and exclusive immunity for their actions.

Id.; see also *F.G. v. MacDonell*, 696 A.2d 697, 705 (N.J. 1997) ("In the sanctuary of the church, . . . troubled parishioners should be able to seek pastoral counseling free from the fear that the counselors will sexually abuse them. Our decision does no more than extend to the defenseless the same protection that the dissent would extend to infants and incompetents."). To the extent that churches are insured for the tortious conduct of their clergy, holding churches liable might also advance the other primary tort goal of spreading or distributing risks and losses. One problem with this logic, however, is the arguably attenuated relationship between church revenue, on the one hand, and, on the other hand, the nature of the services provided by churches as well as the beneficiaries of these services. See Eric William Cernyar, *The Checking Value of Free Exercise: Religious Clashes with the State*, 3 TEX. REV. L. & POL. 191, 220 & n.171 (1999) (contending that "[i]mposing unmitigated tort liability on religious bodies punishes innocent believers and threatens their right to continued participation in the worship and fellowship of that religious community" and noting Professor Douglas Laycock's argument that "[t]ort liability against religious organizations is vicarious in the extreme. The loss falls on innocent believers who had nothing to do with the wrong, no opportunity to profit from the wrong, and little or no opportunity to supervise or prevent the wrong." (quoting *Amicus Curiae Br. in Supp. of Granting Cert. at 9, International Soc'y for Krishna Consciousness v. George*, 499 U.S. 914 (1991))). But cf. Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 143 (1996).

People join religious associations because the collectivity allows them to obtain certain spiritual and material benefits that, even after subtracting cooperation costs (for example, tithes and contributions), exceed the benefits that the members could obtain alone. Religious associations scold, excommunicate, or at least fail to praise people who miss services, commit sins, and violate rituals.

Id.

81. See, e.g., *Doe v. Hartz*, 52 F. Supp. 2d 1027, 1060-62 (N.D. Iowa 1999) (noting that "there is a split in authority concerning whether and under what circumstances relationships between members of the clergy or a diocese and an individual parishioner can give rise to an actionable fiduciary duty" and consequently that "whether or not a breach-of-fiduciary-duty claim can be asserted against a member of the clergy, a diocese, or a bishop is something of an open question" and then proceeding to hold that such a claim is actionable). See generally Clayton P. Gillette, *Lock-In Effects in Law and Norms*, 78 B.U. L. REV. 813, 824-25 (1998) ("Judicial decisions have characteristics . . . that allow subsequent judges substantial discretion in deciding whether to apply potential precedents. There may be multiple relevant precedents, the selection of one of which leads to different results than if another selection

That the legal decisionmakers in such cases are state judges is, however, only the first and narrower point worth noting. The second and broader point is that they are judges at all. Again, institutionally speaking there is nothing neutral about the judicial system, and placing a dispute within its parameters necessarily means that the dispute's resolution will vary according to the institutional peculiarities of that system. What makes this a relevant consideration is that judges, as a group, when faced with a dispute pitting religious interests against governmental or secular interests, generally seem inclined towards devaluing the former while concomitantly overstating the latter.

Though potentially controversial, this hypothesis derives support from both empirical and theoretical bases. The empirical basis is simply the poor track record of religious freedom claims presented to courts,⁸² which is partly the result of apparent judicial distortion of the free exercise analysis in ways that hinder the claimant.⁸³ (Of course, this argument is somewhat weakened by the fact that a

is made from the same plausible set."'). If precedent were unavailable, a judge could certainly find support from the legal academy, some members of which seem also to have difficulty fully appreciating the gravity of the constitutional issues at stake. *See, e.g., Villiers, supra* note 61, at 4.

The doctrine of separation of church and state does not relieve the state of its responsibility to protect its citizens from harm when clergy are engaged in nonreligious activities. If women do not get redress for these wrongs, they are victimized repeatedly, first by the clergy and then by the legal system. To correct this manifest injustice, the courts must acknowledge the balance envisioned by the Framers of the Constitution, where an equally powerful state and church coexist. This balance is not upset by recognition of the clergy malpractice action.

Id.; *see also id.* at 52-63 (setting forth a fuller but no less aggressive constitutional analysis).

82. *See* Douglas W. Kmiec, *The Original Understanding of the Free Exercise Clause and Religious Diversity*, 59 UMKC L. REV. 591, 596 (1991) (noting in terms of Supreme Court cases that "[e]xcept for the unemployment compensation cases and the cases allowing Amish parents to keep their children out of public school after eighth grade, claims for religious exemptions were largely unsuccessful") (footnote omitted); James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1412 (1992) (concluding that "the decisions in the United States courts of appeals over the ten years preceding *Smith* reveals that, despite the apparent protection afforded claimants by the language of the compelling interest test, courts overwhelmingly sided with the government when applying that test"). Codifying religious freedom seems not to improve the odds. *See* Ira C. Lupo, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 585 (1998) (concluding that the Religious Freedom Restoration Act, which statutorily reinstated strict scrutiny after *Smith*, "failed to produce any substantial improvement in the legal atmosphere surrounding religious liberty in the United States").

83. When strict scrutiny is employed in free exercise cases, for example, the range of government interests that qualify as "compelling" appears to be much broader than in other constitutional contexts, such as free speech or equal protection, where strict scrutiny is also employed. *See* Marci A. Hamilton, *The Belief/Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure To Protect Religious Conduct*, 54 OHIO ST. L.J. 713, 751-54 (1993); Idleman, *supra* note 70, at 279 & n.159. *But cf.* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1498-1500 (1999) (arguing that this apparent differential reflects not an inconsistency in the definition of compelling interests, but rather the inherent differences between religiously

number of courts, at least to date, *have* barred suits against religious defendants on constitutional grounds.) The theoretical basis has at least two components. First, judges (particularly appellate judges) comprise a rather elite class who may have difficulty relating to the claims of the religiously devout, whether in general or in the specific case of religious entities defending against tort actions.⁸⁴ This difficulty may reflect their own diminished religious devoutness, or it may result from a heightened commitment to empirical, rationalist modes of knowledge and discourse to which religious devoutness may seem foreign.⁸⁵

motivated conduct and, for example, speech); Eugene Volokh, *Freedom of Speech, Permissible Tailoring, and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2451-52 (1996) (noting this disjunction and offering possible explanations).

84. See, e.g., E. Gregory Wallace, *When Government Speaks Religiously*, 21 FLA. ST. U. L. REV. 1183, 1221 n.188 (1994) ("In many instances, . . . judges may more closely represent society's secularized intellectual elite than the general population. If that is true, they would more likely assume the view of the nonreligious or antireligious outsider rather than the view of one who belongs to a religious minority."); Lupu, *supra* note 82, at 593 (arguing that judicial discomfort with claims of religious exemption could be attributable in part to the fact that "judges, drawn from America's highly educated elite, may be skeptical about intensely held religious commitments"); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 126 (1992).

In its attitude toward religion, the [Supreme] Court may typify the gulf between a largely secularized professional and academic elite and most ordinary citizens, for whom religion commonly remains a central aspect of life. How many of the Justices and their clerks have had personal experience with serious religion—religion understood as more than ceremony, as the guiding principle of life? How many have close friends or associates who have had such experiences? For those who have lived their lives among academics and professionals, it may be difficult to understand why believers attach so much importance to things that seem so inconsequential.

Id. (footnotes omitted); see also Stephen L. Carter, *Introduction to Faith and the Law Symposium*, 27 TEX. TECH. L. REV. 925, 929 (1996) (arguing, in regard to the question of how conflicts between religious dictates and civil law should be resolved, that "secular law has lately preferred to pretend that the question does not exist—or rather, that the answer is obvious. *Of course* one's first allegiance is to the secular sovereign; *of course* the laws of that secular sovereign trump any religious principles with which they come into contact; *of course* reasonable religious people understand this hierarchy and abide by it. Anybody who believes anything else, we dismiss as a fanatic."); Idleman, *supra* note 70, at 255-57 & nn.31-38 (discussing elite discomfort with religious devoutness). Regarding the elitism of judges, especially Supreme Court Justices, see generally George W. Dent, Jr., *Secularism and the Supreme Court*, 1999 BYUL. REV. 1, 54-58; A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C. L. REV. 409, 498-500 (1999).

85. See STEPHEN L. CARTER, *THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY* 104-05 (1998) (addressing "the difficulty that judges have in accepting the religious world view as one that can possibly guide a just and sensible citizen, and the consequent judicial intolerance of the disobedience that religion sometimes makes necessary"); Gedicks, *supra* note 2, at 141 (noting that judges operate within "a culture that generally values rationalism over the nonrational ways of knowing, understanding, and living that characterize much of religious life"); Paul Horwitz, *The Sources and Limits of Freedom*

Second and relatedly, judges tend by nature to be relatively statist: "Typically, elected and appointed judges share a common perspective in which the preservation of order is central to their administration."⁸⁶ Accordingly, judges tend to balk at the notion that the governing law—and, in turn, their jurisdiction—might somehow be constrained by factors extraneous to the law itself.⁸⁷ Hence the Supreme Court's proclamation in *Employment Division v. Smith*⁸⁸ that

of Religion in a Liberal Democracy: Section 2(a) and Beyond, 54 U. TORONTO FAC. L. REV. 1, 5 (1996) ("To the degree that the state bases its decisions on a rational, liberal framework, the qualities that make religion unique and valuable—its allegiance to the irrational and the supernatural—will cause religious goals to be subordinated to statist goals.") (footnote omitted). This is not to suggest that legislators or administrators are necessarily more amenable than judges to the claims of the religiously devout. See Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693, 749 (1997).

A critic especially concerned about secularist assumptions might warn that judges will always be drawn from the relatively secularized elite, while legislators and bureaucrats are forced institutionally to listen to—and are more likely to be drawn from—the more religious classes of society (at least the more numerous faiths). But to the extent that there was such a difference between judges and other decisionmakers, it probably has shrunk a considerable amount. Many of the most important decisionmakers on issues of religion and public life, especially those involving the public schools, are bureaucrats who have themselves been professionally socialized to be hostile to active, public religion. At the very least, they are so committed to their programs as to be unsympathetic about their effects on religious freedom.

Id.

86. J. Thomas Sullivan, *Requiem for RFRA: A Philosophical and Political Response*, 20 U. ARK. LITTLE ROCK L.J. 795, 798 (1998) ("This perspective often predominates over their philosophical and political views, so that liberals and conservatives alike tend to share a common belief in the need for social stability reflected in orderly governmental process.").

87. See *id.* (commenting that "judges are the instruments of secular institutions, committed to furthering an agenda central to secularly-determined values—for example, commitment to the 'rule of law,' as opposed to the 'rule of God'"); see also CARTER, *supra* note 85, at 105.

[T]he courts are part of the government. They are . . . not a *check on* the sovereign but a *part of* the sovereign So all the fine talk about "judicial review" as a way to test the actions of a thing called "the government" or "the state" against another thing called "the Constitution" is often little more than that: fine talk. . . . [A]t the end of the day, the branches of government . . . all . . . share an interest in the survival of constituted authority.

Id. (emphasis in original) "[T]he judicial concern for disobedience is not a concern only about the edicts of the courts. Judges, as part of the sovereign, view with displeasure any efforts to thwart the sovereign's will, unless the defendants are able to convince the judges that their efforts are in furtherance of a higher constitutional goal." *Id.* at 114 (emphasis in original); see also Craig Anthony Arnold, *Religious Freedom as a Civil Rights Struggle*, NEXUS, Fall 1997, at 149, 159-60 ("In general, . . . forced compliance with government regulation may be purposeful and rational from a government's viewpoint: it fears that the faithful have abandoned some sort of social contract for some form of religious covenant, and it must reassert the primacy of the social contract, civil government.").

88. 494 U.S. 872 (1990).

[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself,"—contradicts both constitutional tradition and common sense.⁸⁹

In short, the fact that the adjudicability of tort claims against religious entities is largely a judicial matter, and more specifically a state judicial matter, does not necessarily portend a bright future for the current limitation on such actions, especially in light of various cultural developments. Given these considerations, in fact, it is somewhat surprising that so many courts to date have been willing to countenance the nonadjudication of various tort actions against religious defendants.

C. Doctrinal and Theoretical Factors

Compounding both the cultural and institutional phenomena thus far mentioned are certain features of current religion jurisprudence under the First Amendment. Three such features will be addressed here: a doctrinal shift towards formal neutrality under both religion clauses (accompanied by an apparent theoretical loss of the First Amendment's religious foundations); the lack of an adequate constitutional grounding, in doctrine or theory, of the existing bar on adjudicating tort disputes against religious entities (or, for that matter, the more general prohibition on adjudicating religious questions); and, lastly, a potential disfavoritism towards viewing religious liberty in institutional terms.

First and most importantly, the Supreme Court in recent years has consistently recalibrated its jurisprudential conception of "neutrality" essentially to mean equality-of-treatment between religion and nonreligion.⁹⁰ Thus, according to this revised view, the Free Exercise Clause should generally not be read to require accommodation for religious practices where such accommodation would not be required or is not provided for nonreligious practices,⁹¹ while the Establishment

89. *Id.* at 885 (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988), and *Reynolds v. United States*, 98 U.S. (8 Otto) 145, 167 (1878), respectively); see also Hamilton, *supra* note 83, at 789 & n.451 (discussing the influence of considerations of "law and order" on the Supreme Court's free exercise doctrine).

90. See, e.g., Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1,16-24 (2000); Dhananjai Shivakumar, *Neutrality and the Religion Clauses*, 33 HARV. C.R.-C.L. L. REV. 505, 506-23 (1998). Professor Michael McConnell has noted that the *Smith* Court's retention of a discretionary accommodation doctrine, despite its general repudiation of a mandatory accommodation doctrine, is not consistent with a pure model of formal neutrality, which "would make unconstitutional all legislation that explicitly exempts religious institutions or individuals from generally applicable burdens or obligations." McConnell, *supra* note 84, at 166-67.

91. See, e.g., *Smith*, 494 U.S. 872. Correspondingly, when a law that sufficiently burdens religious beliefs or practices provides for one or more nonreligious exemptions but not a

Clause should generally not be read to prohibit support to religion (at a widely diffused level) where such support is also provided to nonreligion.⁹² In other words, "current religion clause doctrine is being 'normalized'" wherein the doctrines governing religion-government relations are "[n]o longer constitutionally distinct"⁹³ Whatever the causes of this shift,⁹⁴ and however much it might be

religious exemption, it may be subject to strict scrutiny. *See id.* at 883-84 (discussing unemployment compensation cases); *Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir.) (mandating religious exemption from police department no-beard policy because "the Department's decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny"), *cert. denied*, 120 S. Ct. 56 (1999); *cf.* *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993) (invalidating municipal ordinances prohibiting ritualistic animal slaughter, which contained several nonreligious exemptions, because they were neither neutral nor generally applicable; the ordinances' "underinclusion" was "substantial, not inconsequential"). The anomaly is the *Smith* Court's hybrid rights concept, whereby strict scrutiny may be triggered when a free exercise claim is asserted in tandem with another constitutional right. *Smith*, 494 U.S. at 881-82.

92. This includes not only financial support, but also public resources in general, such as use of government property and services. *See, e.g.,* *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *see also* Frederick Mark Gedicks, *The Improbability of Religion Clause Theory*, 27 SETON HALL L. REV. 1233, 1236 (1997).

Instead of being subject to special restrictions in competing for government recognition and financial assistance, religious individuals and groups (with the important exception of parochial schools) are increasingly treated like their secular counterparts, constitutionally entitled to receive the same recognition and assistance as is available to secular organizations. Instead of being uniquely exempt from the obligation to obey the law, religious practice receives only what other constitutionally protected freedoms receive—the promise that government cannot consciously discriminate against it.

Id.

For recent state court decisions in the school voucher context, compare *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998) (upholding a Wisconsin law providing for educational vouchers, even if used substantially at religious schools, in part because the law is facially neutral between religious and nonreligious schools), *cert. denied*, 119 S. Ct. 466 (1998), with *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127 (Me.) (holding that a Maine law expressly excluding religious schools from receiving state funds does not, despite a lack of facial neutrality, violate the Free Exercise, Establishment, or Equal Protection Clauses), *cert. denied*, 120 S. Ct. 364 (1999).

93. Gedicks, *supra* note 92, at 1236.

Certainly one way to ensure that the government is genuinely neutral as between religion and non-religion—to ensure, that is, that the level of religious activity in American society is the result of individual choices unaffected by governmental encouragement or discouragement—is precisely to normalize the constitutional law of religion. Normalization is achieved by requiring constraints on religion under the Establishment Clause only when such constraints would

applauded by those who condone government aid to religion, it almost certainly presents a challenge to the extant differential treatment of tort actions against religious defendants. Superficially, at least, the "neutral" approach would now entail subjecting such defendants and their conduct to the same adjudicatory processes as their nonreligious counterparts,⁹⁵ a prospect that has already been partly realized by the Court's embrace of the "neutral principles of law" approach to resolving church property cases and, in turn, by the lower court utilization of that approach to resolve tort suits against religious defendants.⁹⁶

This normalization of religion clause doctrine and the resulting inconsistency of barring tort actions against religious defendants are only reinforced by the strong jurisprudential commitment to equal treatment as found both in constitutional law⁹⁷ and our more general legal traditions.⁹⁸ Whether one focuses on the victims of

also be imposed on analogous secular activities, and by affording protection to religious practice under the Free Exercise Clause only when such protection is given to analogous secular activities.

Id. at 1257.

94. Professor Gedicks, for one, argues that this "[n]ormalization is a natural doctrinal manifestation of the Court's commitment to secular individualism." *Id.* at 1257. *See also* Conkle, *supra* note 90, at 32-35.

95. *See, e.g.,* Lightman v. Flaum, 687 N.Y.S.2d 562, 569, 570 (N.Y. Sup. Ct. 1999) (holding that the plaintiff could pursue a claim against her rabbi for breach of the clergy-penitent privilege in part because "there is no compelling reason here to shield these Rabbis from liability in tort for revealing such sensitive, personal communications, when other similarly situated professionals are subject to potential liability under statutory provisions analogous in scope and purpose to that at issue here" and because a contrary rule under the facts of the case "would improperly and unwisely create a standard for these defendants, as Orthodox Rabbis, different from that followed by the rest of society").

96. *See* Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 404-08 (1987) (arguing that the neutral principles approach may undercut the doctrine of church autonomy); *infra* text accompanying notes 115-18 (discussing the case law). Of course, whether the "neutral principles of law" approach ultimately restricts the general prohibition, or ultimately serves to reinforce it, will depend substantially on the reach of the neutrality requirement. If neutrality means nothing more than *defined* without particular regard to religion, then many doctrines of tort law will be deemed neutral and, thus, applicable. If, however, it also means *applied* without particular regard to religion, then, as discussed earlier, those doctrines of tort law that necessitate reliance on or inquiry into religious doctrine or norms may very well fail the neutrality test. Many thanks to Professor Eugene Volokh for raising this point.

97. *See, e.g.,* Romer v. Evans, 517 U.S. 620, 633 (1996) ("Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."); Conkle, *supra* note 90, at 5-24.

98. *See, e.g.,* Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 39 (1994) (noting that the principle "that similarly situated litigants are treated equally . . . is considered a hallmark of fairness in a regime committed to the rule of law"). Additionally, as suggested *supra* text accompanying note 80, it might also be observed that the traditional goals of tort law, such as compensation and deterrence, are obviously disserved as well by the nonadjudication of suits against religious defendants, constitutional considerations notwithstanding.

religious tortfeasors or on the religious tortfeasors themselves, when claims against such tortfeasors are barred, the appearance is one of unequal treatment by the legal system. It is true, of course, that the free exercise doctrine of accommodation itself may raise this concern.⁹⁹ The difference here, however, is that the plaintiff is not being disallowed a benefit accorded only to some citizens, but rather is effectively being deprived of a right—the redressability of tortious injury—that is otherwise enjoyed by every citizen.¹⁰⁰ Arguably, the Court's recent reconstruction of neutrality as equality is intended to preclude this very type of differential legal treatment insofar as it results from privileging religion in a substantively unique way.¹⁰¹

What makes this jurisprudential shift even more profound is that the extant limitation on tort suits against religious defendants is itself inadequately grounded from a constitutional standpoint, thus leaving it vulnerable to modification or even elimination. As the *Smith* case amply demonstrated, doctrines that lack solid theoretical footing can be highly susceptible to revisionism, even where the precedents are relatively clear and not of particularly recent vintage.¹⁰² Yet, as one

99. See *Employment Div. v. Smith*, 494 U.S. 872, 885 (1990) (stating that a doctrine of mandatory accommodation "contradicts both constitutional tradition and common sense"); Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77 (2000); Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555, 570-71 (1998) (noting that uniquely favorable treatment of religion, in the form of free exercise exemptions, does not necessarily sit well with "a society committed to individual equality"); Perry Dane, Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350, 356 (1980) (arguing that religion-based exemptions are vulnerable, among other things, to the objection that they "contradict the rule of law").

100. Additionally, religious institutions themselves may have an interest in not overly asserting the bar on adjudicating religious questions, lest they, too, might be unable to utilize the legal system. See, e.g., *Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar*, 179 F.3d 1244, 1248 (9th Cir. 1999) ("[W]e must be careful not to deprive religious organizations of all recourse to the protections of civil law that are available to all others. Such a deprivation would raise its own serious problems under the Free Exercise Clause. It would also leave religious organizations at the mercy of anyone who appropriated their property with an assertion of religious right to it.") (citation omitted); *Chittenden v. Waterbury Ctr. Community Church, Inc.*, 726 A.2d 20, 26-27 (Vt. 1998) (noting in a property case that "if a court's analysis and decision-making constituted 'excessive government entanglement' then religious institutions would never have recourse in court as to any dispute in which their religious status was in issue"); cf. *Encore Prods., Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101, 1113 (Colo. 1999) (deciding to enforce a religiously-based arbitration agreement, despite potential entanglement concerns, in part because the court's refusal to do so could "creat[e] . . . an unjust bias against religion, thereby depriving [a party] of its free exercise rights").

101. But see *Gibson v. Brewer*, 952 S.W.2d 239, 247-48 (Mo. 1997) (en banc) (treating the nonrecognition of a cause of action for negligent supervision as a permissible accommodation that does not violate the Establishment Clause).

102. See *Idleman*, *supra* note 70, at 291 (arguing that "a failure to articulate the underlying principles and rationales for religious liberty . . . is one reason that Justice Scalia could so easily rearrange free exercise doctrine in *Smith*"); see also *supra* note 53 (noting as well the Court's revision of the its abortion jurisprudence, which, as articulated in *Roe v. Wade*, 410

state supreme court justice (now chief justice) notes in regard to tort suits against religious defendants, "[i]t is generally acknowledged that this area of First Amendment law is in flux and the United States Supreme Court cases offer very limited guidance."¹⁰³ This lack of guidance is evident not only by the splits of authority among the nation's jurisdictions, but even more fundamentally by the lack of consensus about which clause of the First Amendment undergirds the inadjudicability of such suits.¹⁰⁴ (So nonuniform are the rulings in this area that it is difficult even to imagine that it is genuinely a matter of constitutional law, although it is true that many areas of constitutional jurisprudence do, from time to time, fall into a state of doctrinal disarray.) Unfortunately, the foundationless nature of the prohibition on adjudicating religious questions finds no refuge or alleviation in the more general jurisprudence of the religion clauses. For the Court's religion cases as a whole are themselves devoid of theoretical depth,¹⁰⁵ a problem that some have suggested may have no apparent resolution.¹⁰⁶

A final characteristic of First Amendment doctrine adverse to the continued protection of religious entities against tort actions is an apparent disfavoritism, found in judicial decisions and reflective of the larger culture, towards conceptualizing religious liberty in institutional terms. While there is much debate over the proper scope of protection for individual free exercise, few if any observers have difficulty locating individual free exercise itself within the ambit of the First Amendment. From the outset, however, the Court (for one) has not so readily recognized a strong

U.S. 113 (1973), is widely recognized as having lacked meaningful constitutional grounding from the standpoint of theory or principle).

103. Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 794 (Wis. 1995) (Abrahamson, J., dissenting); see also Swanson v. Roman Catholic Bishop of Portland, 692 A.2d 441, 446-47 (Me. 1997) (Lipez, J., dissenting) (remarking that this is "an area of the law in which the U.S. Supreme Court cases offer limited guidance and there remains significant doctrinal uncertainty").

104. See *supra* text accompanying notes 16-20. This is largely the fault of the Supreme Court, which has never fully explained or justified the general limitation on adjudicating religious questions or the specific limitation on deferring to religious institutional decisions. See Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 VILL. L. REV. 401, 416-17 (1991) (noting the Court's lack of guidance in the intrachurch dispute cases).

105. See, e.g., William P. Marshall, *What Is the Matter with Equality?*, 75 IND. L.J. 193, 194-96 (2000); William P. Marshall, *Truth and the Religion Clauses*, 43 DEPAUL L. REV. 243, 243 (1994) (arguing that "[t]here is little agreement as to what values underlie the Religion Clauses of the First Amendment" and that religion clause jurisprudence is "perceived as shallow, inconsistent, and nonpersuasive").

106. See, e.g., FREDERICK MARK GEDICKS, *THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE* (1995); STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* (1995); Gedicks, *supra* note 92. But see Berg, *supra* note 85 (responding to Professors Smith and Gedicks and proposing a theory grounded in religious voluntarism); David E. Steinberg, *Gardening at Night: Religion and Choice*, 74 NOTRE DAME L. REV. 987, 1015 (1999) (reviewing SMITH, *supra*) (responding to Professor Smith and arguing that "the religion clauses were intended to protect and promote religious choice").

relationship between free exercise and institutionalized religion,¹⁰⁷ although the church property cases—when understood as free exercise cases—are an exception. More importantly, there is arguably within American culture a general discomfort with according preferred legal status or heightened protection to institutionalized religion, perhaps traceable to certain strands of Protestant theology,¹⁰⁸ to a distrust of group self-definition and communal disassociation,¹⁰⁹ to a related concern about

107. See, e.g., Glendon & Yanes, *supra* note 1, at 489, 495-96 (noting that the Court's decisions, beginning in the late 1940s and early 1950s, "constru[ed] the free exercise provision as mainly protecting individual rights, largely ignoring its associational and institutional dimensions" and further noting, in regard to *Sherbert* and *Schempp*, that the Court's "individualistic construction of free exercise backed up by a 'compelling interest' test discouraged government from interfering with the religious rights of solitary individuals, but ignored the associational aspects of free exercise"); see also Gedicks, *supra* note 92, at 1241.

With *Everson*, the Supreme Court abandoned religious communitarianism as a normative guide to church-state relations, in favor of secular individualism. Although governmental neutrality among particular Protestant sects was consistent with religious communitarianism, such neutrality between Protestants and non-Protestants and between believers and nonbelievers was antithetical to it. Likewise, although the institutional separation of church and state was consistent with the religious communitarianism, the more decisive cultural and political division implied by the 'wall of separation' was not.

Id.; see Phillip E. Johnson, *Afterword*, NEXUS, Fall 1997, at 169, 171.

[T]he disagreement [among Supreme Court Justices] over the desirability of religious exemptions cannot be explained by any simplistic 'pro-or-anti-religion' formula. What does help to explain the lineup is that political liberals tend to be indulgent towards harmless individuals and small groups who have quaint beliefs, while being intensely suspicious of "organized religion"—meaning groups like the Catholic Church and evangelical Protestants, who might challenge the liberal hegemony.

Id.

108. See, e.g., Steven D. Smith, *Separation and the Fanatic*, 85 VA. L. REV. 213, 234-38 (1999) (reviewing TIMOTHY L. HALL, *SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY* (1998)) (relating Roger Williams's spiritual-temporal disjunction to individual religious isolationism and "[t]he cultural and spiritual fragmentation associated with separation"). See generally Edward J. Eberle, *Roger Williams' Gift: Religious Freedom in America*, 4 ROGER WILLIAMS U. L. REV. 425 (1999).

109. See Gedicks, *supra* note 2, at 141.

A decision in favor of religious group self-definition requires that a judge labor against the combined forces of a political system in which government regulation and individual rights talk are both commonplace, and a culture that generally values rationalism over the nonrational ways of knowing, understanding, and living that characterize much of religious life.

Id.; see also Michael W. McConnell, "God Is Dead and We Have Killed Him!": *Freedom of Religion in the Post-Modern Age*, 1993 BYUL REV. 163, 173 (observing that "[a] liberalism based on individualism, independence, and rationalism . . . has a tendency to see traditional religion as authoritarian, irrational, and divisive—as a potential threat to our democratic institutions"). For recent academic efforts to reconcile communal disassociation with constitutional doctrine and liberal philosophical principles, see generally Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1 (1996), Mark D. Rosen,

protecting the sovereignty of civil government,¹¹⁰ or to latent or lingering anti-Catholicism.¹¹¹

Of course, it is questionable whether, as a matter of constitutional principle, the First Amendment could actually be interpreted to exclude institutional claims, particularly those seeking accommodation.¹¹² But this does not mean that such claims must be, or will be, given the same level of solicitude as individual claims, possibly reflecting the relative political influence of institutions versus individuals.¹¹³ Nor does

The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory, 84 VA. L. REV. 1053 (1998).

110. See, e.g., Stephen L. Carter, *The Supreme Court, 1992 Term—Comment: The Resurrection of Religious Freedom?*, 107 HARV. L. REV. 118, 138 (1992) ("The religionist, citing the sovereignty of religious tradition, will sometimes say to the secular state, 'I refuse to do as you command, because I answer to a higher authority.' This is a radically destabilizing proposition . . ."); Sanford Levinson, *Constituting Communities Through Words That Bind: Reflections on Loyalty Oaths*, 84 MICH. L. REV. 1440, 1467 (1986).

[R]eligion . . . makes obvious claims of sovereignty as against other social institutions. A staple of political theory following the development of the notion of political sovereignty by Bodin is that there cannot be two sovereigns within a polity. By definition sovereignty is an exclusive status. Yet anyone who takes (at least Western) religion seriously poses an alternative sovereign against the claims of the State, however much the claims are dissipated by doctrines like the Talmudic injunction to follow the local law or by Christian doctrines about God and Caesar.

Id. (footnote omitted).

The concern about the competing sovereign nature of religion is by no means limited to claims of institutional free exercise, as opposed to claims of individual free exercise, but the dimension of institutionalization probably enhances or exacerbates this concern. See CARTER, *supra* note 85, at 62 ("America's legally constituted sovereigns have generally been less kind to dissenting groups than to dissenting individuals, perhaps because the one is more dangerous than the other.").

111. See generally Edward McGlynn Gaffney, Jr., *Hostility to Religion, American Style*, 42 DEPAUL L. REV. 263, 279-92 (1992) (cataloguing the history and persistence of American anti-Catholicism); Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 417-18 (1986) (likewise providing examples of how "Roman Catholics have experienced hostility throughout our history").

112. Compare Garrett Epps, *What We Talk About When We Talk About Free Exercise*, 30 ARIZ. ST. L.J. 563, 593 (1998) ("There are certainly no grounds to argue that free exercise protects only individual claims."), with Lupu, *supra* note 96, at 422-27 (arguing that institutional free exercise accommodation claims are indefensible).

113. See Epps, *supra* note 112, at 594.

[T]here is no *a priori* reason why a court could not factor into its analysis the degree to which the organizational claimant has access to political influence; this analysis would not differ conceptually from the Court's established practice of employing more probing scrutiny when examining laws that restrict the rights of "discrete and insular minorities" than when adjudicating equal protection challenges to laws affecting larger or more influential groups within the political process.

Id. (emphasis in original) (footnote omitted) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)).

it mean that the judiciary cannot adopt certain tests or doctrines that institutional claimants, in comparison to individual claimants, may find more difficult to satisfy.¹¹⁴ And, in all events, it does not mean that the judiciary will not increasingly be influenced by the cultural forces and doctrinal trends noted earlier, which, when combined with this potential disposition against unduly protecting let alone privileging institutional religion, may not bode well for the continued existence of the bar on tort actions against institutional religious defendants.

III. THE FORM OF ITS DEMISE

Because the First Amendment obstacles to adjudicating tort claims against religious defendants cannot in principle be ignored outright, courts seeking to overcome these obstacles must rely upon or develop various exceptions to the First Amendment's application. This Part of the Article shall discuss several such potential exceptions, all of which are drawn from existing cases. As the discussion will note, however, the legitimacy of many of these exceptions or the manner in which they are applied is questionable; some, in fact, are not so much exceptions to the general prohibition as they are partial abrogations of it.

The most widely invoked exception involves the so-called neutral principles method, which allows the adjudication of religious institutional disputes when they can be resolved according to "neutral principles of law," that is, legal rules or standards that have been developed and are regularly applied in a given field of law without particular regard to religious institutions or doctrines.¹¹⁵ According to the

That said, there are examples outside of the traditional tort context in which institutional free exercise is protected in ways that individual free exercise is not. *See, e.g.*, 42 U.S.C. § 2000e-1(a) (1994) (providing exemption from Title VII of the 1964 Civil Rights Act, which otherwise prohibits religious discrimination, any "religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities"); *id.* § 2000e-2(e)(2) (similarly allowing religious educational institutions, under certain conditions, "to hire and employ employees of a particular religion"); *cf. id.* § 2000e-2(e)(1) (allowing any employer to hire "on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise").

114. *See* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 955 (1989) ("[T]o the extent that sincerity requires a demonstration of heart-felt commitment, rather than the less demanding qualities of credibility or authenticity, sincerity as a free exercise element may also be marked by a bias in favor of individual over institutional forms of religion.").

115. *See* *Jones v. Wolf*, 443 U.S. 595, 602-04 (1979) (discussing the neutral principles approach); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969) (discussing the possibility of "neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded"); *Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar*, 179 F.3d 1244, 1249 (9th Cir. 1999).

The Supreme Court has held that, wholly apart from the hierarchical decision-making apparatus of the religious organization, a court may resolve

Supreme Court, this method "relies exclusively on objective, well-established concepts of . . . law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice."¹¹⁶ Although the Court has not sanctioned this method outside the relatively limited context of intrachurch property disputes,¹¹⁷ several lower courts have nevertheless extended its application to assess the adjudicability of otherwise barred tort actions against religious defendants.¹¹⁸

property disputes by applying secular principles of property, trust and corporate law when the instruments upon which those principles operate are at hand. Thus no First Amendment issue arises when a court resolves a church property dispute by relying on state statutes concerning the holding of religious property, the language in the relevant deeds, and the terms of corporate charters of religious organizations.

Id. According to the Court, use of a neutral principles approach is permissible, but not necessary, in lieu of wholesale deference to the religious institutional decision. *See Jones*, 443 U.S. at 604 ("We . . . hold that a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute.").

116. *Jones*, 443 U.S. at 603; *see also* *South Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elem. Sch.*, 696 A.2d 709, 723 (N.J. 1997) ("Neutral principles' are wholly secular legal rules whose application to religious parties does not entail theological or doctrinal evaluations.").

Under this analysis, courts should focus on "the language of the deeds, the terms of the local church charter, the State statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property," taking special care to examine each of these documents in secular terms and not relying on religious precepts to determine whether the parties intended a particular result.

Trustees of Diocese v. Trinity Episcopal Church, 684 N.Y.S.2d 76, 80 (N.Y. App. Div. 1999) (quoting *First Presbyterian Church v. United Presbyterian Church in the U.S.*, 464 N.E.2d 454, 460-61 (N.Y.), *cert. denied*, 469 U.S. 1037 (1984)). For an analysis of what should and should not be considered "neutral principles," and of how courts have applied the neutral principles method, *see generally* Patty Gerstenblith, *Civil Court Resolution of Property Disputes Among Religious Organizations*, 39 AM. U. L. REV. 513 (1990); *see also* William G. Ross, *The Need for an Exclusive and Uniform Application of "Neutral Principles" in the Adjudication of Church Property Disputes*, 32 ST. LOUIS U. L.J. 263 (1987).

117. *See Hutchison v. Thomas*, 789 F.2d 392, 396 (6th Cir. 1986) (noting that "[t]he 'neutral principles' doctrine has never been extended to religious controversies in the areas of church government, order and discipline"); *Klagsbrun v. Va'ad Harabonim of Greater Monsey*, 53 F. Supp. 2d 732, 737-38 (D.N.J. 1999) (discussing, among other cases, *Scotts African Union Methodist Protestant Church v. Conference of African Union First Colored Methodist Protestant Church*, 98 F.3d 78, 91-92 (3d Cir. 1996), *cert. denied*, 519 U.S. 1058 (1997), and concluding that "the Third Circuit made clear that the neutral principles approach, rather than the deference approach, would apply without regard to the type of case before the court").

118. *See, e.g., Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 10 F. Supp. 2d 138, 148 (D. Conn. 1998) (holding that a fiduciary duty claim against a diocese "was capable of being resolved under Connecticut law using neutral principles and that to do so neither the Court nor the jury needed to evaluate or weigh ecclesiastical standards based on church doctrine or inquire into matters of purely ecclesiastical nature to assess the conduct of the

A second and often accompanying means to avoid the adjudicatory bar is simply to deem the relevant question or conduct nonreligious, thus by definition placing it outside of the prohibition. As one court concluded, “[t]ort actions against religious groups or persons are not offensive to the First Amendment if based on purely secular activities, unrelated to their religious functions”¹¹⁹ Or, as summarized by the

Diocese under the circumstances of its knowledge and position”); *Smith v. O’Connell*, 986 F. Supp. 73, 77-80 (D.R.I. 1997) (applying “neutral principles of law” approach to the tort context, essentially equating it with the “neutral laws of general application” concept addressed in *Employment Div. v. Smith*, 494 U.S. 872 (1990)); *Isely v. Capuchin Province*, 880 F. Supp. 1138, 1151 (E.D. Mich. 1995) (applying neutral principles of law approach to negligent supervision claim); *Moses v. Diocese of Colo.*, 863 P.2d 310, 320-21 (Colo. 1993) (en banc) (approving use of neutral principles approach to various tort claims, and similarly equating it with the “neutral laws of general application” concept of *Smith*), *cert. denied*, 511 U.S. 1137 (1994); *Mulinix v. Mulinix*, No. C2-97-297, 1997 WL 585775, at *6 (Minn. Ct. App. Sept. 22, 1997) (embracing the neutral principles approach in the tort context though ultimately declining adjudication); *L.L.N. v. Clauder*, 563 N.W.2d 434, 440 (Wis. 1997) (examining “whether the determination of [a] claim for negligent supervision would allow a court to apply neutral principles of law”). Courts have also applied the neutral principles approach to suits against religious defendants involving civil rights, *see Krebs v. Keating*, Chancery No. 97-118, 1997 WL 1070589, at *3 (Va. Cir. Ct. May 6, 1997), and contract disputes. *See, e.g., Kleppinger v. Anglican Catholic Church, Inc.*, 715 A.2d 1033, 1038 (N.J. Super. Ct. Ch. Div. 1998) (“Neutral principles may be particularly suited for adjudications of civil contract actions as well.”) (citing *Welter v. Seton Hall Univ.*, 608 A.2d 206 (N.J. 1992); *Elmora Hebrew Ctr., Inc. v. Fishman*, 593 A.2d 725 (N.J. 1991); *Jewish Ctr. v. Whale*, 432 A.2d 521 (N.J. 1981)).

119. *H.R.B. v. J.L.G.*, 913 S.W.2d 92, 98 (Mo. Ct. App. 1995); *see also Konkle v. Henson*, 672 N.E.2d 450, 455 n.6 (Ind. Ct. App. 1996) (“[R]eview only requires the court to determine if the Church Defendants knew of Henson’s inappropriate conduct, yet failed to protect third parties from him. The court is simply applying secular standards to secular conduct which is permissible under First Amendment standards.”); *C.J.C. v. Corporation of Catholic Bishop*, 985 P.2d 262, 277 (Wash. 1999) (en banc) (“The First Amendment does not provide churches with absolute immunity to engage in tortious conduct. So long as liability is predicated on secular conduct and does not involve the interpretation of church doctrine or religious beliefs, it does not offend constitutional principles.”); *Martinez v. Primera Asamblea de Dios, Inc.*, No. 05-96-01458-CV, 1998 WL 242412, at *3 (Tex. App. May 15, 1998) (“The Free Exercise clause has never immunized clergy or churches from all causes of action alleging tortious conduct. Religious groups may be held liable in tort for secular acts.”) (citation omitted). This distinction is also applied to limit the judicially crafted “ministerial exception” to Title VII of the Civil Rights Act of 1964. *See Bollard v. California Province of Soc’y of Jesus*, No. C 97-3006 SL, 1998 WL 273011, at *3 (N.D. Cal. May 15, 1998) (“Limits to this ‘ministerial exception’ to Title VII have been articulated in cases where the plaintiff is a church employee who performs a secular function, rather than a clergy member performing religious functions.”); *Schmoll v. Chapman Univ.*, 83 Cal. Rptr. 2d 426, 429 n.4 (Cal. Ct. App. 1999) (stating that “the First Amendment is not implicated when a religious institution makes an employment decision about an employee whose ‘duties [do not] go to the heart of the church’s function in the manner of a minister or a seminary teacher’”) (alteration in original) (quoting *EEOC v. Pacific Press Publ’g Ass’n*, 676 F.2d 1272, 1278 (9th Cir. 1982)). *See generally Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328, 332 (4th Cir. 1997) (discussing and applying the “primary duties” analysis); *EEOC v. Roman Catholic Diocese*, 48 F. Supp. 2d 505, 509-15

New York Court of Appeals:

A longstanding principle of First Amendment jurisprudence forbids civil courts from deciding issues of religious doctrine or ecclesiastical polity. This prohibition does not apply to civil adjudication of purely secular legal questions. Courts can decide secular legal questions in cases involving some background issues of religious doctrine, so long as they do not intrude into the determination of the doctrinal issues.¹²⁰

Needless to say, both this approach and the neutral principles approach involve a substantial risk that judges will erroneously recategorize matters as nonreligious simply to subject them to adjudication,¹²¹ a risk that is magnified by the possibility that some judges may not even be aware that such recategorization is occurring, let alone that it poses a serious First Amendment problem. Illustrative is one court's holding that "if the alleged wrongdoing was clearly outside the tenets of the religion, notwithstanding its religious pretext, then it is actionable."¹²² Yet to determine whether conduct is or is not consistent with the tenets of the religion, even at the extremes, is itself to violate the prohibition against judicial interpretation of religious doctrine.¹²³

(E.D.N.C. 1999) (discussing generally the ministerial exception and citing the principal cases); *Schmoll*, 83 Cal. Rptr. 2d at 429-31 (same).

120. *South Jersey Catholic Sch. Teachers Org. v. St. Teresa of Infant Jesus Church Elementary Sch.*, 696 A.2d 709, 723 (N.J. 1997).

121. *See Ran-Dav's County Kosher, Inc. v. State*, 608 A.2d 1353, 1363 (N.J. 1992) (admonishing that "[r]eligious doctrines cannot be recast as secular principles simply because they are clear" and that "religious doctrines [do not] become neutral simply because they are widely or even universally held"), *cert. denied*, 507 U.S. 952 (1993); *see also Dean v. Alford*, 994 S.W.2d 392, 395 (Tex. App. 1999) (noting the "difficulty . . . in determining whether a particular dispute is 'ecclesiastical' or simply a civil law controversy in which church officials happen to be involved").

122. *H.R.B.*, 913 S.W.2d at 98; *see also Smith v. O'Connell*, 986 F. Supp. 73, 78 (D.R.I. 1997) (relying on the defendants' interpretation of Catholic doctrine—for example, "they have made it clear that the Catholic Church considers such conduct to be opprobrious"—to justify imposition of a reasonably prudent person standard under tort law); *Destefano v. Grabrian*, 763 P.2d 275, 284 (Colo. 1988) (en banc) ("When the alleged wrongdoing of a cleric clearly falls outside the beliefs and doctrine of his religion, he cannot avail himself of the protection afforded by the first amendment.").

123. *See New York v. Cathedral Academy*, 434 U.S. 125, 133 (1977) ("The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment, and it cannot be dismissed by saying it will happen only once.").

The one clear exception to this prohibition, as it relates to measuring the internal consistency between one's beliefs and one's conduct, is a judge's or a jury's inquiry into a free exercise claimant's sincerity. *See, e.g., Mosier v. Maynard*, 937 F.2d 1521, 1523, 1526-27 (10th Cir. 1991) (elaborating on the nature of the sincerity analysis); *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985) ("[I]t is entirely appropriate, indeed necessary, for a court to engage in analysis of the sincerity—as opposed, of course, to the verity—of someone's religious beliefs in . . . the free exercise context . . ."), *aff'd*, 479 U.S. 60 (1986); *United States v. Lemon*, 723 F.2d 922, 938 n.49 (D.C. Cir. 1983) ("Sincerity can be the only

This second method was recently applied—and in this author's opinion erroneously so—by a lower New York state court, which ultimately held that a plaintiff could sue her rabbi for alleged breach of the clergy-penitent privilege.¹²⁴ Though noting the general bar on adjudicating religious questions,¹²⁵ the court then indicated that liability or sanctions may be imposed for a religious defendant's conduct if it is "secular in nature," that is, if "liability is imposed equally, for religious institutions and parties, as well as for others, and where the basis for such liability may be determined without examination into religious law or policies."¹²⁶ In determining the nature of the defendant rabbi's conduct, however, the court then took it upon itself to find (1) that "no member of the clergy . . . would dare breach the sanctity of his or her office to make public the type of confidential, private disclosures at issue in this case";¹²⁷ (2) that the defendant's justification of the conduct "under the guise of religious necessity, conviction or the protection of the Torah, is not only wrong, it is outrageous"¹²⁸ because "disclosure was not required to prevent [the defendant rabbi] from violating Jewish law or tradition"¹²⁹ and he did not have "a 'religious obligation as a Rabbi' to make public what had been imparted";¹³⁰ and (3) that "[p]lainly, there is no justification, religious or otherwise, for disclosing that plaintiff had been seeing men outside the marriage."¹³¹ Slightly less plain, of course, is what justification this judge had for declaring as a matter of New York state law the obligations of Orthodox rabbis to their congregants under Jewish law, especially as a means of determining that the defendant's conduct was not truly religious or religiously motivated in nature. Be that as it may, this type of judicial reasoning clearly illustrates the facility with which judges, when so inclined, can effectively sidestep or subordinate the First Amendment in the apparent service of other ends.

test, for any inquiry into the truth or falsity of beliefs is barred by the first amendment." This position is not uniformly held, however. *See, e.g.,* *United States v. Aguilar*, 883 F.2d 662, 696 n.33 (9th Cir. 1989) (stating that sincerity of belief is "a standard which is ill-suited for adjudication" and interpreting *United States v. Ballard*, 322 U.S. 78 (1944), as "counseling against entering the 'forbidden domain' of testing the sincerity of religious beliefs" (quoting *Ballard*, 322 U.S. at 87)), *cert. denied*, 498 U.S. 1046 (1991); *Trinity United Methodist Parish v. Board of Educ.*, 907 F. Supp. 707, 718 (S.D.N.Y. 1995) (interpreting *Ballard* as holding that "[a]nalysis under the Free Exercise Clause does not involve a court in determining the sincerity of one's religious beliefs . . ."); *Banks v. Board of Pub. Instruction*, 314 F. Supp. 285, 295-96 (S.D. Fla. 1970) (citing *Ballard* and holding that an inquiry into whether a plaintiff sincerely holds his religious views "is not a proper consideration for a court"), *judgment vacated on other grounds*, 401 U.S. 988 (1971); *Sheldon v. Fannin*, 221 F. Supp. 766, 775 (D. Ariz. 1963) (citing *Ballard* and holding that "the First Amendment . . . guarantees to the plaintiffs the right to claim that their objection to standing is based upon religious belief, and the sincerity or reasonableness of this claim may not be examined by this or any other Court").

124. *See Lightman v. Flaum*, 687 N.Y.S.2d 562 (N.Y. Sup. Ct. 1999).

125. *See id.* at 568.

126. *Id.*

127. *Id.* at 569.

128. *Id.* at 570.

129. *Id.*

130. *Id.*

131. *Id.*

A third and alternative method is to concede that the issue or conduct is religious, but then to find that it is religious only to an inconsequential or minor degree. As the New Jersey Supreme Court stated in a breach of contract case,

[j]ust as the existence of a tangential secular issue does not authorize civil courts to override primarily doctrinal determinations by authorities in hierarchical religions, inconsequential doctrinal issues that were irrelevant to the employment relationship do not preclude doctrinally-objective enforcement of a secular interest pursuant to a secular agreement.¹³²

Thus, in that case, even though the plaintiffs "may have submitted voluntarily to the unreviewable discipline" of a religious order, their affiliation with the religious order "did not amount to a waiver of secular rights to which their status as clerics was incidental at best."¹³³ Of course, judicial determinations of this sort not only pose potential violations of the prohibition on interpreting religious doctrine—from whose perspective should the religious aspect of an act or relationship be deemed minor?—but they also raise the related issue of institutional competence as discussed in *Employment Division v. Smith*.¹³⁴

Courts have also attempted to avoid the adjudicatory bar by simply devising categorical exceptions, without regard to the fact that the relevant issue or conduct may still be religious. These exceptions work by shifting the focus to some aspect of the issue or conduct that appears to justify adjudication, but in reality serve to obscure or divert attention from the question of religiousness. At least four such exceptions can be identified. First, some courts have drawn a line between conduct affecting

132. *Welter v. Seton Hall Univ.*, 608 A.2d 206, 217 (N.J. 1992) (citation omitted). *But cf.* *United Kosher Butcher's Ass'n v. Associated Synagogues of Greater Boston, Inc.*, 211 N.E.2d 332, 334 (Mass. 1965) ("Phrasing the issue raised . . . in terms of whether the controversy is 'primarily' or 'largely' a religious one can be misleading. . . . [J]udicial intervention is determined by the nature of the central issue to be resolved, and not by the incidental or consequential results of the decision.").

133. *Welter*, 608 A.2d at 217.

134. 494 U.S. 872, 886-87 & n.4 (1990). On the matter of judicial competence, see also *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1871) ("It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so."); *Saunders-El v. Tsoulos*, 1 F. Supp. 2d 845, 848 (N.D. Ill. 1998) ("The court notes at the outset the undesirability of judges donning religious robes over judicial ones. The courts are not equipped to resolve intra-faith differences among followers of a particular creed in relation to the Religion Clauses."); *Presbytery of Beaver-Butler v. Middlesex Presbyterian Church*, 489 A.2d 1317, 1320 (Pa.), *cert. denied*, 474 U.S. 887 (1985).

[T]he right to practice one's belief and worship as one chooses is so deep a root of our constitutional culture that a court, even one with the best intentions, can be no more than a clumsy intruder into the most delicate and sensitive areas of human life. When Caesar enters the Temple to decide what the Temple believes, he can leave behind only his own views. The view of a court as to who are heretics among warring sects is worth nothing, and must count as nothing if our cherished diversity of religious views is to prevail.

persons sufficiently affiliated with the religious institution and conduct affecting third parties.¹³⁵ Second and relatedly, some courts have also drawn a line between conduct that occurs within the spatial bounds or authoritative domain of the religious institution and conduct that occurs outside of those parameters.¹³⁶ Third, some courts

135. See, e.g., *Paul v. Watchtower Bible & Tract Soc'y*, 819 F.2d 875, 883 (9th Cir.) (distinguishing for purposes of judicial scrutiny between church conduct towards members or former members and church conduct towards nonmembers), *cert. denied*, 484 U.S. 926 (1987); *Konkle v. Henson*, 672 N.E.2d 450, 455 n.6 (Ind. Ct. App. 1996) ("[T]he cases involving the court's power to act in internal church disputes are not applicable to cases involving harm to third persons. The limits on the court's power are confined to intra-church disputes.") (citing *United Methodist Church v. California Superior Court*, 439 U.S. 1369, 1372 (1978) (Rehnquist, C.J.)); *Smith v. Calvary Christian Church*, 592 N.W.2d 713, 718-20 (Mich. Ct. App. 1998) (surveying the cases distinguishing between suits by church members and suits by nonmembers); *Hadnot v. Shaw*, 826 P.2d 978, 988 (Okla. 1992) (holding that ecclesiastical jurisdiction, and thus bar against civil court scrutiny, does not extend to nonmembers because "the church has no power over those who live outside of the spiritual community"); *In re Pleasant Glade Assembly of God*, 991 S.W.2d 85, 90 (Tex. App. 1998) (stating in regard to various tort claims that "the First-Amendment defense based on the free-exercise clause is particularly likely to succeed where, as here, the plaintiffs were or had been members of the religious group involved"), *order stayed on other grounds*, No. 2-98-222-CV, 1999 WL 13249 (Tex. App. Jan. 13, 1999); cf. Laycock, *supra* note 14, at 1403-09 (discussing the potential distinction in church autonomy cases between internal and external relations). Consider in this regard the Colorado Supreme Court's analysis in *Bear Valley Church of Christ v. DeBose*, 928 P.2d 1315 (Colo. 1996) (en banc), *cert. denied*, 520 U.S. 1241 (1997), and *cert. denied*, 520 U.S. 1248 (1997). Responding to a church's argument that the First Amendment precluded tort claims against it for negligent hiring, supervising, disciplining, and discharging a minister, the Court stated:

In *Van Osdol v. Vogt*, 908 P.2d 1122, 1128 (Colo. 1996), we held that "[t]he decision to hire or discharge a minister is itself inextricable from religious doctrine." However, we took care to distinguish internal hiring disputes within religious organizations from general negligence claims filed by injured third parties: "[T]he court . . . looks to whether the specific danger which ultimately manifested itself could have reasonably been foreseen at the time of hiring. This inquiry, even when applied to a minister employee, is so limited and factually based that it can be accomplished with no inquiry into religious beliefs." As we noted in *Van Osdol*, courts may review an injured third party's claim that a religious institution negligently hired, supervised, or failed to discharge one of its employees without implicating or running afoul of the First Amendment.

Id. at 1323-24 (alteration in original) (selected citations omitted) (quoting *Van Osdol v. Vogt*, 908 P.2d 1122, 1128, 1132 n.17 (Colo. 1996)).

136. See, e.g., *Hayden v. Schulte*, 701 So. 2d 1354, 1356 (La. Ct. App. 1997) (finding subject matter jurisdiction over a defamation action against a church, in part because the plaintiff claimed that the allegedly defamatory statements were "intentionally disseminated outside the church to news organizations"), *writ denied*, 709 So. 2d 737 (La. 1998); see also *McNair v. Worldwide Church of God*, 242 Cal. Rptr. 823, 833 (Cal. Ct. App. 1987) (deeming it a "crucial fact" that the defendant's allegedly defamatory remarks "were made while he was explaining Church doctrine" at a pastoral conference and in a pastor's report); *First United Church v. Udofia*, 479 S.E.2d 146, 148-49 (Ga. Ct. App. 1996) (acknowledging that normally "the civil courts will not inquire into or determine the validity of the expulsion of a member

appear to consider the prohibition inapplicable in cases alleging intentional tortious conduct.¹³⁷ Finally, courts likewise appear to consider the prohibition inapplicable where the otherwise inadjudicable conduct allegedly involves fraud.¹³⁸

from a church having a congregational form of government" but concluding that "here the statements about the plaintiffs were not done in the course of an investigation of their church membership, and plaintiffs do not seek civil court relief in the form of return to membership, which would be outside the court's competence"; *Murphy v. I.S.K. Con. of New Eng., Inc.*, 571 N.E.2d 340, 349 n.11 (Mass.) (disallowing tort claim in part because the religious doctrines related to the allegedly tortious conduct "were taught to [the plaintiff] at regularly scheduled temple meetings"), *cert. denied*, 502 U.S. 865 (1991); *Schoenhals v. Mains*, 504 N.W.2d 233, 236 (Minn. Ct. App. 1993) ("[T]he fact that the [allegedly defamatory] letter was disseminated only to other members of the Church strengthens the conclusion that [the defendant's] statements involved and were limited to Church discipline. The [plaintiffs'] claim clearly involves an internal conflict within the Church, which is precluded by the First Amendment."); *Howard v. Covenant Apostolic Church, Inc.*, 705 N.E.2d 385, 388-89 (Ohio Ct. App. 1997) (rejecting defamation claim because the alleged defamatory remarks "took place during the meeting that was held to determine whether he should be disfellowed from the Church, were made to or by those involved in initiating the disfellowship proceedings, and concerned issues of appellant's morality"), *appeal not allowed*, 688 N.E.2d 1043 (Ohio 1998).

137. *See, e.g.*, *Gibson v. Brewer*, 952 S.W.2d 239, 248 (Mo. 1997) (en banc) (rejecting a claim of negligent supervision but holding that "[r]ecognizing the tort of intentional failure to supervise clergy, in contrast, does not offend the First Amendment"); *Hester v. Barnett*, 723 S.W.2d 544, 552 (Mo. Ct. App. 1987) (stating that "[t]he intentional torts of a cleric are . . . actionable, . . . even though incidents of religious practice and belief"); *F.G. v. MacDonell*, 696 A.2d 697, 702 (N.J. 1997) (noting that "courts have recognized claims for intentional torts against clergymen" and citing cases); *see also* *Korean Presbyterian Church of Seattle Normalization Comm. v. Lee*, 880 P.2d 565, 569 & n.6 (Wash. Ct. App. 1994) (noting that some courts "suggest that no intentional torts should enjoy religious protection" and holding, in regard to the tort of outrage for a church's disclosure of plaintiffs' excommunication, that "[w]here a plaintiff can establish that the defendant acted with actual malice, such malice negates any claim that the action was undertaken for religious purposes"). The *Lee* court, however, further stated that "[w]hatever the definition of actual malice is, it cannot entail an analysis of whether a hierarchical church violated its own laws and procedures; such an analysis is otherwise prohibited by the ecclesiastical abstention doctrine." *Id.* at 570.

138. *See, e.g.*, *Fire Baptized Holiness Church of God of the Americas v. Greater Fuller Tabernacle Fire Baptized Holiness Church*, 475 S.E.2d 767, 770 (S.C. Ct. App. 1996) (per curiam) ("Absent fraud or collusion, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive because the parties in interest made them so by contract or otherwise."); *Libhart v. Copeland*, 949 S.W.2d 783, 794 (Tex. App. 1997) ("[G]enerally the court should not intervene in church disputes. However, when church proceedings are tainted by fraud, judicial review is appropriate.") (citations omitted). *See generally* *Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696, 713 (1976) (discussing significance of fraud or collusion, though rejecting exception for alleged arbitrariness); *cf.* *Jones v. Wolf*, 443 U.S. 595, 609 n.8 (1979) (reaffirming fraud-collusion principle of *Milivojevic*). For a seemingly strong contrary position, *see* *Tilton v. Marshall*, 925 S.W.2d 672, 678 (Tex. 1996).

[N]o claim of fraud may be made if it rests on a representation of religious doctrine or belief—even if insincerely made. For example, most courts would probably hold that a claim of fraud is not actionable if based upon the

Although other exceptions no doubt exist,¹³⁹ the above listing sufficiently demonstrates the vulnerability of the prohibition to judicial avoidance and, thus, gives some indication of how it might be sidestepped or eroded on a more widescale basis in the future. Whether such erosion need occur—and specifically what counterforces might prevent or minimize it—will provide the focus of the next and final Part of the Article.

IV. THE PREVENTION OF ITS DEMISE

The developments described in Parts II and III, though significant, do not render inevitable the demise of either the general prohibition on adjudicating religious questions or the specific bar on certain tort suits against religious entities. Not yet addressed are other factors that could cause or signal the retention, even the strengthening, of the prohibition, as well as additional measures that could be undertaken to forestall its demise. This final Part of the Article shall briefly address these considerations.

First of all, there has emerged over the last several years a multitude of aggressive religious litigation firms or institutions, several of which operate within relatively sophisticated regional or national networks.¹⁴⁰ Although there is no strong indication

representation that, in exchange for a monetary contribution, God will cure a sick donor's illness. As long as the representation forming the basis of the fraud claim is a religious doctrine or belief, it is constitutionally protected from judicial inquiry.

Id. (citations omitted). "[B]ecause the truth or falsity of a religious representation is beyond the scope of judicial inquiry, the sincerity of the person making such a representation is irrelevant when the religious representation forms the basis of a fraud claim. Whether the statement of religious doctrine or belief is made honestly or in bad faith is of no moment, because falsity cannot be proved." *Id.* at 679.

139. One court, for example, has held that it is not improper to recognize foreign court judgments even if they stem from an adjudication that domestically would be impermissible under the general prohibition. *See Imuta v. Nakano*, 59 Cal. Rptr. 2d 78, 86 (Cal. Ct. App. 1996) (unpublished opinion) ("We do not understand *Milivojevich* as disenfranchising a civil court from ignoring an act of an ecclesiastical judicatory where another court—particularly a foreign court not shown to have lacked jurisdiction to decide the matter—has rendered a final decision determining that act to be invalid.").

140. *See* Mark G. Valencia, Comment, *Take Care of Me When I Am Dead: An Examination of American Church-State Development and the Future of American Religious Liberty*, 49 SMUL. REV. 1579, 1628-29 (1996) (discussing "the emergence of law firms that specialize in religious liberty litigation"); *see generally* James H. Andrews, *Religious Right Fights*, CHRISTIAN SCI. MONITOR, Feb. 7, 1994, at 14 (discussing the American Center for Law and Justice ("ACLJ"), the Christian Legal Society ("CLS"), and the Rutherford Institute); Elizabeth Gleick, *Onward Christian Lawyers*, TIME, Mar. 13, 1995, at 57 (discussing the ACLJ and the Regent University School of Law); Julia McCord, *Defending Religious Rights*, OMAHA WORLD-HERALD, Apr. 29, 1995, available in 1995 WL 4071414 (discussing the ACLJ, the Rutherford Institute, the CLS, the American Family Association Law Center, and the Alliance Defense Fund); Roger K. Newman, *Suits with Agendas*, NAT'L L.J., Aug. 26, 1996, at A1 (discussing generally the rise of conservative public interest litigation groups and specifically the ACLJ and the CLS); Larry Witham, *Activists Defend Religious Liberty*,

that defending tort suits against religious entities is a significant component of their efforts to date, nevertheless one can find some evidence of their participation in such suits.¹⁴¹ More significantly, they are well-situated to undertake a more active role in the future and, as courts increasingly divide over issues of adjudicability and religious entities are increasingly exposed to liability, they may very well do so.

Additionally, although a number of courts presently appear willing (or even eager) to extend and apply their states' tort law to religious tortfeasors that engage in otherwise actionable and sometimes outrageous conduct, at some point many of these courts probably would be willing to acknowledge the serious problems of doctrinal entanglement, among others, inherent in such adjudication. Even if they are not willing at first, they may become so once they are asked to formulate a standard of clergy conduct, for example, or to declare that a particular interpretation and application of scripture is legally unreasonable. As one federal district judge remarked:

It may be argued that it requires no excessive entanglement with religion to decide that reasonably prudent clergy of any sect do not molest children. The difficulty is that this Court . . . must consider not only this case, but the next case to follow, and the ones after that, before we embrace the newly invented tort of clergy malpractice. This places us clearly on the slippery slope . . .¹⁴²

In turn, perhaps through the educative experience of litigation, what presently appears to be a judicial trajectory towards adjudicability could soften into a realization that the prohibition on adjudicating certain claims may reflect a deeper, sounder understanding of the nature and status of religion and the limits of the law within the American constitutional scheme. It is true that legal momentum does not often suddenly or easily change course, just as the judicial office does not often gracefully concede error, but even judges can succumb to the persuasive force of reality.¹⁴³

WASH. TIMES, July 6, 1995, at A2 (discussing the Becket Fund for Religious Liberty).

141. See, e.g., *Klagsbrun v. Va'ad Harabonim of Greater Monsey*, 53 F. Supp. 2d 732, 733 (D.N.J. 1999) (listing Marc D. Stern, general counsel for the American Jewish Congress, as defendants' counsel of record); *Hayden v. Schulte*, 701 So. 2d 1354, 1355 (La. Ct. App. 1997) (listing William Bentley Ball as co-counsel for defendants-appellees), *writ denied*, 709 So. 2d 737 (La. 1998); *Gibson v. Brewer*, 952 S.W.2d 239, 243 (Mo. 1997) (en banc) (listing Professor Carl Esbeck and the CLS's Center for Law & Religious Freedom as amici); *Byrd v. Faber*, 565 N.E.2d 584, 586 (Ohio 1991) (listing the Baptist Joint Committee on Public Affairs, the American Jewish Congress, the CLS, the National Association of Evangelicals, and the National Council of Churches of Christ in the U.S.A. as amici).

142. *Schmidt v. Bishop*, 779 F. Supp. 321, 328 (S.D.N.Y. 1991).

143. Cf. *Moldea v. New York Times Co.*, 22 F.3d 310, 311 (D.C. Cir. 1994) (withdrawing an earlier opinion and candidly acknowledging that it rested on "a mistake of judgment").

Once discovered, confessing error is relatively easy. What is difficult is accepting the realization that, despite your best efforts, you may still fall prey to an error of judgment. . . . I will take refuge in an aphorism of Justice Frankfurter: "Wisdom too often never comes, and so one ought not to reject it merely because it comes late."

Id. (quoting *Henslee v. Union Planters Nat'l Bank & Trust Co.*, 335 U.S. 595, 600 (1949))

The fate of the bar on adjudicating tort actions against religious entities may also partly rest in the hands of the religious entities themselves, and their conduct in addressing church and clergy wrongdoing may greatly influence the course of legal evolution on this matter. At some level, the judicial willingness to hear such claims may largely reflect the perceived inaction or recalcitrance of religious institutions in regard to a problem otherwise within their exclusive control. To the extent, therefore, that these institutions become more responsive in the first instance to allegations of misconduct, while concomitantly working to prevent and address actual misconduct, courts may perceive a diminished necessity to impose the deterrence and compensation mechanisms of tort law on these institutions.¹⁴⁴

Finally, there is always a chance that the Supreme Court could, in a cavalry-like fashion, enter the field and hold that the adjudication of various tort claims against religious entities, with some exceptions, does in fact violate the First Amendment. Reliance on this prospect should not be the strategy of choice, however. For one thing, the Court has steadfastly refused over the last several years to address the adjudicability of religious issues,¹⁴⁵ despite ample opportunity to do so¹⁴⁶ and despite

(Frankfurter, J., dissenting)).

144. See generally Tom Heinen, *Archdiocese Set To Require Criminal Background Checks*, MILW. J.-SENTINEL, July 16, 1999, at B1, 5 (describing the Milwaukee Archdiocese's new policy of checking backgrounds of volunteers working with youth and how such policies are becoming more common, and reporting one commentator's sense that "[c]hurch-related allegations of sexual abuse involving children and adult victims have stabilized in the past four years" due, in his opinion, to "lawsuits, growing public awareness, and more education of church officials"); Smith, *supra* note 66, at 418-20 (noting potential advantages to churches for reporting clergy sexual abuse of children, including possible immunity of church officials against criminal or civil liability, a possible reduction in future civil liability, and a preclusion of claims for alleged criminal or negligent failure to report where a duty to do so exists under state law).

145. See Nathan Clay Belzer, *Deference in the Judicial Resolution of Intrachurch Disputes: The Lesser of Two Constitutional Evils*, 11 ST. THOMAS L. REV. 109, 112 (1998) (observing that "the Supreme Court has not addressed th[e] issue [of adjudicating intrachurch disputes] since the *Wolf* decision in 1979" and that "[s]tate courts, therefore, have been the final arbiter of intrachurch dispute resolution during the course of the last eighteen years").

146. A survey of the Court's most recent terms suffices to illustrate its consistent avoidance of such cases. See, e.g., *Fundamentalist Church of Jesus Christ of Latter-day Saints v. Bradshaw*, 119 S. Ct. 1803 (1999), *denying cert. to* 970 P.2d 1234 (Utah 1998); *Hengle v. Ward*, 119 S. Ct. 183 (1998), *denying cert. to* 706 N.E.2d 392 (Ohio Ct. App. 1997); *Baucum v. Sanders*, 119 S. Ct. 161 (1998), *denying cert. to* 134 F.3d 331 (5th Cir. 1998); *Weaver v. Wood*, 522 U.S. 1049 (1998), *denying cert. to* 134 F.3d 331 (5th Cir. 1998); *Roman Catholic Diocese of Brooklyn v. Kenneth R.*, 522 U.S. 967 (1997), *denying cert. to* 654 N.Y.S.2d 791 (N.Y. App. Div. 1997); *Grand Fraternity Rosae Crucis v. Moyer*, 118 S. Ct. 297 (1997), *denying cert. to* 114 F.3d 1172 (3d Cir. 1997); *Zimmer v. Naumann*, 522 U.S. 820 (1997), *denying cert. to* 1997 WL 10520 (Minn. Ct. App. June 16, 1997); *Bear Valley Church of Christ v. DeBose*, 520 U.S. 1248 (1997), *denying cert. to* 928 P.2d 1315 (Colo. 1996); *Wolfe v. DeBose*, 520 U.S. 1241 (1997), *denying cert. to* 890 P.2d 214 (Colo. 1995); *Croatian Roman Catholic Congregation of Holy Trinity Church v. Wuerl*, 519 U.S. 1114 (1997), *denying cert. to* 668 A.2d 1151 (Pa. Super. Ct. 1995), *appeal denied*, 683 A.2d 884 (Pa. 1996); *Rocky Mtn. Conf. of United Methodist Church v. Winkler*, 519 U.S. 1093 (1997),

the warrant for such review in the stark division of state and federal courts over important constitutional questions.¹⁴⁷ For another thing, the Supreme Court could very well hold that the general rule be one *in favor of* adjudicability and that any exceptions, such as for genuine religious questions or formal ecclesiastical decisions, be relatively limited. After all, the Free Exercise Clause is no longer the wellspring of heightened scrutiny that it once appeared to be, and as noted earlier the Court's neutrality-as-equality interpretation of both clauses does not, at first blush, seem to favor the differential treatment of tort actions against religious defendants merely because their adjudication may implicate religious questions. That said, it nevertheless remains true that the Court could, in one or two opinions, essentially resolve the matter against adjudicability and thereby retard or reverse any movement to the contrary.

denying cert. to 923 P.2d 152 (Colo. Ct. App. 1995); Conference of African Union First Colored Methodist Protestant Church v. Scotts African Union Methodist Protestant Church, 519 U.S. 1058 (1997), *denying cert. to* 541 N.W.2d 606 (Minn. Ct. App. 1996); African Union Methodist Protestant Church & Connection v. Mother African Union First Colored Methodist Protestant Church, 519 U.S. 1042 (1996), *denying cert. to* 683 A.2d 58 (Del. 1996); Singleton v. Christ the Servant Evangelical Lutheran Church, 519 U.S. 870 (1996), *denying cert. to* 541 N.W.2d 606 (Minn. Ct. App. 1996); Church of Lord Jesus Christ of Apostolic Faith v. Shelton, 519 U.S. 869 (1996), *denying cert. to* 673 A.2d 398 (Pa. Super Ct. 1995), *appeal denied*, 675 A.2d 1241 (Pa. 1996); Basich v. Evangelical Lutheran Church in Am. Bd. of Pensions, 519 U.S. 810 (1996), *denying cert. to* 540 N.W.2d 25 (Iowa 1995); Pierce v. Iowa-Mo. Conf. of Seventh Day Adventists, 517 U.S. 1220 (1996), *denying cert. to* 534 N.W.2d 425 (Iowa 1995); Green v. United Pentecostal Church Int'l, 517 U.S. 1134 (1996), *denying cert. to* 899 S.W.2d 28 (Tex. Ct. App. 1995); Brach v. Congregation Yetev Lev D'Satmar, Inc., 516 U.S. 1173 (1996), *denying cert. to* 57 F.3d 1064 (2d Cir. 1995); Pritzlaff v. Archdiocese of Milwaukee, 516 U.S. 1116 (1996), *denying cert. to* 533 N.W.2d 780 (Wis. 1995); McKown v. Lundman, 516 U.S. 1099 (1996), *denying cert. to* 530 N.W.2d 807 (Minn. Ct. App. 1995); Lundman v. First Church of Christ, Scientist, 516 U.S. 1092 (1996), *denying cert. to* 530 N.W.2d 807 (Minn. Ct. App. 1995); Geraci v. Eckankar, 516 U.S. 818 (1996), *denying cert. to* 526 N.W.2d 391 (Minn. Ct. App. 1995); Bussey v. Owens, 515 U.S. 1131 (1995), *denying cert. to* [unpublished decision] (D.C. Dec. 15, 1994); Primate & Bishops' Synod of the Russian Orthodox Church v. Russian Orthodox Church of the Holy Resurrection, Inc., 513 U.S. 1121 (1995), *denying cert. to* 636 N.E.2d 211 (Mass. 1994); American Union of Baptists, Inc. v. Trustees of Particular Primitive Baptist Church at Black Rock, Inc., 513 U.S. 1111 (1995), *denying cert. to* 644 A.2d 1063 (Md. Ct. App. 1994); Ricchio v. Poesnecker, 513 U.S. 1079 (1995), *denying cert. to* 631 A.2d 1097 (Pa. Commw. Ct. 1993), *appeal denied*, 647 A.2d 906 (Pa. 1994); Young v. Northern Ill. Conf. of United Methodist Church, 513 U.S. 929 (1994), *denying cert. to* 21 F.2d 184 (7th Cir. 1994).

147. See SUP. CT. R. 10(a)-(c) (enumerating considerations governing the grant of certiorari, especially splits between federal courts and state courts over important federal questions); Braxton v. United States, 500 U.S. 344, 347 (1991) ("[A] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law.").

CONCLUSION

The general rule of not adjudicating tort claims against religious defendants is presently at a cultural and doctrinal crossroads. Whether courts will continue to observe this prohibition, or whether they will precipitate its demise, is by no means a simple inquiry, and the answer cannot depend on just one or two considerations. The development of any legal rule is seldom truly linear and virtually never unifactorial, the prediction of which, accordingly, is often little more than an exercise in speculation. Nevertheless, when several relevant considerations together indicate that the rule in question may be under tremendous strain and that it may not possess the stability or integrity to withstand that strain, one may legitimately predict that the doctrine will, in fact, be gradually eroded.

This Article, taking account of various cultural, institutional, and doctrinal considerations, has argued that such erosion is likely, if not very likely. At the same time, it has recognized the existence of other factors that may actually retard or even forestall a movement away from the general rule of nonadjudicability that presently prevails. Of course, should this erosion occur, it will almost certainly occur incrementally, by means of judicially devised exceptions such as those documented earlier, rather than by wholesale and immediate repudiation. Just as the contemporary constitutional bar on adjudicating religious questions took several decades, even centuries, to develop, so its demise in the tort context, if it is to occur at all, will likely unfold one jurisdiction and one case at a time.

